# Indiana



Volume 28 No. 2 1995

CENTENNIAL YEAR 1894/1895-1994/1995

### CENTENNIAL SYMPOSIUM ISSUE

Symposium: Then, Now and into the Future; A Century of Legal Conflict and Development Lawrence P. Wilkins

Introduction Ann Marie Piscione

ARTICLES

Fragments From Our Fleece: Vignettes From 100 Years in a Great Law School

William F. Harvey

History of the Indiana University School of Law-Indianapolis

Ronald W. Polston

A Short History of Hearsay Reform, with Particular Reference to Hoffman v. Palmer, Eddie Morgan and Jerry Frank Michael Ariens

The New Woman Lawyer and the Challenge of Sexual Equality in Early Twentieth-Century America Virginia G. Drachman

Looking Backward, Looking Foreward: A Century of Legal Change

Lawrence M. Friedman

Balancing Acts: Crisis, Change, and Continuity

in American Family Law, 1890-1990

Michael Grossherg

The Warren Court: Yesterday, Today, and Tomorrow Kermit L. Hall

Why the Nuisance Knot Can't Undo the Takings Muddle Louise A. Halper

One Hundred Years of Modern Legal Thought:
From Langdell and Holmes to Posner and Schlag
Gary Minda

Law and Endangered Species: Is Survival Alone Cause for Celebration?

John Henry Schlegel

NOTES

Medical Malpractice Acts' Statutes of Limitation as they Apply to Minors; Are they Proper?

Scott A. DeVries

Indiana's Neglect of a Dependent Statute: Uses and Abuses
Kenneth D. Dwyer

Proposal for a "Lawful" Public School Curriculum:
Preventive Law From a Societal Perspective
Patricia L. Van Dorn

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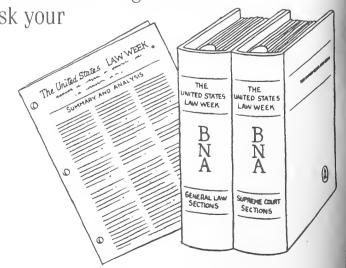
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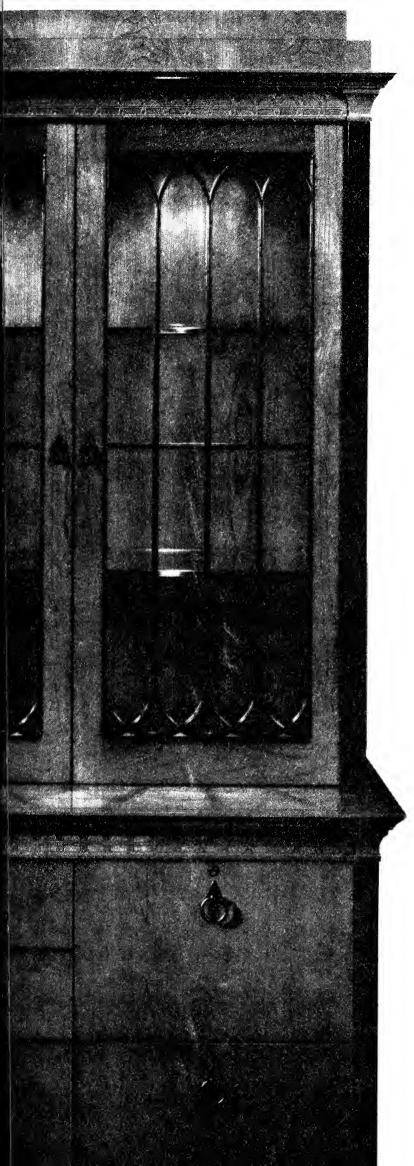


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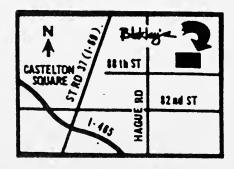
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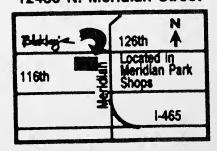
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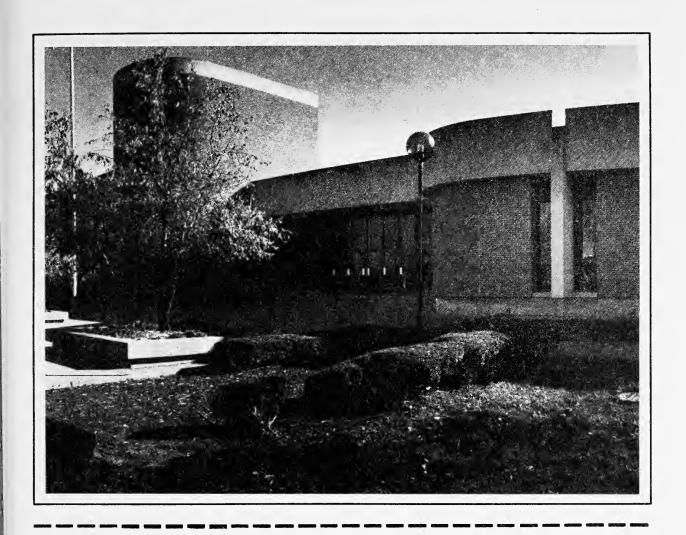
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# TABLE OF CONTENTS CENTENNIAL SYMPOSIUM ISSUE

Symposium: Then, Now and into the Future:  A Century of Legal Conflict and Development	135
Introduction	139
ARTICLES	
Fragments From Our Fleece:  Vignettes From 100 Years in a  Great Law School	143
History of the Indiana University School of Law—Indianapolis	161
A. Short History of Hearsay Reform, with Particular Reference to Hoffman v. Palmer, Eddie Morgan and Jerry Frank	183
The New Woman Lawyer and the Challenge of Sexual Equality in Early Twentieth-Century America Virginia G. Drachman	227
Looking Backward, Looking Foreward: A Century of Legal ChangeLawrence M. Friedman	259
Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990	273
The Warren Court: Yesterday, Today, and Tomorrow	309
Why the Nuisance Knot Can't Undo the Takings Muddle	329
One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag	353
Law and Endangered Species: Is Survival Alone Cause for Celebration?	391

### **NOTES**

Medical Malpractice Acts' Statutes of Limitation as the Apply to Minors: Are they Proper?	413
Indiana's Neglect of a Dependent Statute: Uses and Abuses	447
Proposal for a "Lawful" Public School Curriculum: Preventive Law From a Societal Perspective Patricia L. Van Dorn	477

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### **Indiana Law Review**

Volume 28 1995 Number 2

# SYMPOSIUM: THEN, NOW AND INTO THE FUTURE: A CENTURY OF LEGAL CONFLICT AND DEVELOPMENT

LAWRENCE P. WILKINS\*

### **FOREWORD**

With this issue the *Indiana Law Review* commemorates the Centennial of Indiana University School of Law—Indianapolis with the publication of scholarly papers presented at the School of Law in a Symposium entitled: "Then, Now and Into the Future: A Century of Legal Conflict and Development." This Symposium is an exchange of observations and ideas on a wide range of topics reflecting upon the law and legal education over the past one hundred years and projecting those reflections into the twenty-first century.

These papers present a rich array of historical scholarship in several methodologies, ranging from local archival research to comprehensive analytical overview. Two of my colleagues will relate some of the local history; the beginnings of this law school; and the contributions of the school over the years to legal education, law, and society. They will present narratives on the evolution of Indiana University School of Law—Indianapolis through its predecessors, and several of the people who have helped shape the identity and character of the law school across the years.

Other presenters will broaden the perspective and generalize the subject matter. In the context of various fields of law they will discuss principles of logic, policy, and precedent—of fairness, equality, efficiency and justice—in personal and shared interactions with past events. They will present their observations about and analyses of those principles as they were articulated just before the turn of the twentieth century and as they impinged upon our society at that time.

The presenters will discuss the law of property, families, evidence, and the Constitution. They will examine, in their turn, the legal profession, legal philosophy, educational technique, the judicial process, and, simply, "the law" in American life. They will present their analyses of the development of the law as it has come to be shaped through transactions, disputes and conflicts, deliberative assemblies and adversarial litigation.

If the law can be visualized as a thread made up of those many strands of principles in the various fields of law, it can be imagined that along the length of that thread, the texture, the strength—perhaps even the function—of the law changes as the composition of the strands change and as the strands are spun together in different ways in the various fora in which it is constructed. Examine the end of the thread closest at hand and it can be seen that it is still being fashioned today. To peer down its length along with

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Professors Polston and Harvey in their contributions to this Symposium reveals that this Law School, its faculty and its graduates have been helping to spin that thread and weave it into the larger fabric of society for one hundred years.

The other presenters offer their observations of that thread of law and the changes it has undergone in those one hundred years by examining some individual strands. Their presentations are not merely interesting descriptions of momentous occasions, movements, or interactions in dispute resolution—though they surely are that, each in its particular detail—but more importantly they contain critiques upon which we can reflect and from which we can draw *further* insights. From those insights we can build new ideas about how we can interact with the law individually; about who we are collectively as a society; and about how we want to continue to evolve in both realms.

To return to the metaphor: as we hold the developing end of the thread of law in our hands today and imagine it stretching out across the *coming* century, what do we want it to look like, what texture would we want it to have, what functions would we have it perform? In posing these and other questions in this Symposium, the presenters propose that, as they have done, the reader adopt an interactive, participatory approach to considering these papers. They propose that the reader will project your interaction with them into the future as together we continue to spin and weave that fine thread of law.

The occasion that this Symposium commemorates is the beginning of the first academic year of the predecessor of this school, Indiana Law School, in the fall of 1894. In those early days of our institutional forebears' labors to establish a new law school in the Midwest, they carefully articulated their vision of the school as a link between past and future. Poised at the close of the century and contemplating the mission of their new educational enterprise, they saw their mission as in conflict with the established, apprenticeship, model of learning the law that was dominant in the region. They wanted to offer an academic alternative that would expose students to opportunities for a wider range of legal studies, using modern methods of instruction, and to offer those resources closer to home. The Indiana Law School faculty expressed their idea and objectives this way:

The successful school today must be modern in all respects. The old doctrines must, to a great extent, be laid aside and such a plan of instruction be adopted as will bring about the best results in this later condition of professional and business affairs.<sup>1</sup>

Products of their own times, those founders recognized the value of "office training" as an important tradition and were sensitive to the significance of the *break* with tradition to which they had committed themselves. Acknowledging the apprenticeship model as providing good legal education "in a practical way," they posited that such training alone would not adequately prepare the law student. Cognizant of the demands for legal services that the forces of change had already brought to bear upon lawyers, and would continue to bear upon their graduates in the new century, they wanted to offer their students a richer experience in learning. In their words again, they concluded that:

The need of comprehensive legal training is greater now than ever before. The day is past when a student could obtain adequate legal instruction in the office of an attorney in active practice. With the rapid growth of the country and the consequent complication of business affairs the demand for thoroughly equipped law schools has greatly increased.<sup>2</sup>

The faculty wanted to offer their students "an opportunity to acquire a more thorough and systematic knowledge of the law than has heretofore been afforded them."

It has been said that Mark Twain wrote that history does not repeat itself, but it rhymes.<sup>4</sup> Not quite a century before the founding of the Indiana Law School, Sir Walter Scott wrote: "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."<sup>5</sup>

- 2. Id. at 7.
- 3. *Id*.
- 4. Attributed by Allen D. Boyer in Activist Shareholders, Corporate Directors, and Institutional Investment: Some Lessons from the Robber Barons, 50 WASH. & LEE L. REV. 977, 977 (1993), who saw the attribution in ROBERT SOBEL, PANIC ON WALL STREET 431 (1988). Professor Sobel saw the attribution some time ago in an editorial column in the New York Times, the author of which he cannot recall. He has consulted with several Twain scholars across the country, and all agree that the quotation sounds very much like something Twain would say, but none seems able to find the actual words in Twain's papers. Telephone conversations with Allen D. Boyer and Robert Sobel, March 3, 1995 and March 7, 1995. It is somewhat ironic that this quotation cannot be definitively traced to Twain, whose energies were spent in great measure to protect his rights of authorship.

If accurately attributed, this statement reflects an attitude from which Twain departed in his later writings. But even as late as 1894, the same year the faculty of the Indiana Law School issued its statement, Twain penned a retrospective on civilization in America that paralleled the optimism of the faculty. Twain wrote (about civilization in America), "It is a large word and stands for a large thing—in these latter days. A hundred years ago it was a small thing and simple: now it is vast and complex in its makeup." ROGER B. SALOMON, TWAIN AND THE IMAGE OF HISTORY 31-32 (1961) (citing one of Twain's unpublished manuscripts entitled "Have We Appropriated France's Civilization?," contained in a collection assembled by Bernard DeVoto). Twain's listing of the contributions of and to that civilization that made the lives of its citizens "easier and freer and pleasanter than it was before, and less mean and bitter and hampered," appeared in the following order: political liberty, religious liberty, reduction of capital penalties, equality before the law, women's rights, application of anesthesia to surgery, rational patent laws, development of patents, the cotton gin, and a number of technological devices. *Id.* at 32.

5. SIR WALTER SCOTT, GUY MANNERING 259 (J.M. Dent & Sons Ltd. ed., 1906) (1815). The words were uttered by the character Paulus Pleydell, a lawyer in Scott's story, referring to his books: "[T]he best editions of the best authors, and, in particular, an admirable collection of classics." *Id.* It is interesting that nearly one hundred years before the founding of the school those who would reform the law were concerned with such matters as the use of the pillory as a corrective device, and the destruction of one's home as an eviction method. Scott, a lawyer himself and Clerk of the Court of Sessions, was involved in efforts to reform the law at about the time that he wrote this passage. GRAHAM MCMASTER, SCOTT AND SOCIETY 81-82 (1981). But as a reformer, Scott was also sensitive to the lessons of the past and in his story warned against precipitous destruction of values that were strongly rooted in custom. One of the most poignant parts of the Guy Mannering

In some ways then, this Symposium is intended to "rhyme" with that convocation of legal educators who breathed the first breaths of intellectual life into our institution. We cast our thoughts to our past, not content simply to observe the accomplishments of our predecessors, but to learn from them so that we might offer "a more thorough and systematic knowledge of the law than has heretofore been afforded." Those who would venture to call themselves architects in the law can use these ideas as they fashion the blueprints for the interactions of law and society in the twenty-first century.

story is thought to have been based upon a famous case about which Scott doubtless knew, in which the defendant was charged with having become too exuberant in ejecting some recalcitrant tenants.

The [complaining] witness described how Sellar [the defendant] had come to his home in June 1814, nearly two years before, with twenty men besides four sheriff officers, who had pulled down and set fire to the house and its barns. His mother-in-law, Margaret MacKay, was still in the house when it was set on fire, for she was a hundred years old and bed ridden though she was not ill.

Id. at 159 (quoting IAN GRIMBLE, THE TRIAL OF PATRICK SELLAR 5 (1962)).

Scott wrote of a landlord who, despite the warnings by old servants against taking action against an ancient settlement of "gipsies" on his estate, was determined to exercise his newly-acquired authority as a magistrate and clear the land:

The Laird had, by this time, determined to make root-and-branch work with the Maroons of Derncleugh . . . and violent measures of ejection were resorted to. A strong posse of peace-officers, sufficient to render all resistance vain, charged the inhabitants to depart by noon; and, as they did not obey, the officers, in terms of the warrant, proceeded to unroof the cottages, and pull down the wretched doors and windows,—a summary and effectual mode of ejection still practiced in some remote parts of Scotland, when a tenant proves refractory.

SCOTT, supra, at 62.

The narrator of the story muses:

The race, it is true, which he had thus summarily dismissed from their ancient place of refuge, was idle and vicious; but had he endeavored to render them otherwise? . . . [A]nd ought the mere circumstance of his becoming a magistrate to have made at once a change in his conduct towards them? Some means of reformation ought at least to have been tried, before sending seven families at once upon the wide world, and depriving them of a degree of countenance, which withheld them at least from atrocious guilt.

SCOTT, supra, at 64.

Shortly after having his men perform the eviction, The Laird met a caravan of the refugees from the posse's "root and branch" work. The leader of the clan, one Meg Merrilies [Margaret MacKay in literary reincarnation?], uttered a curse upon the Laird:

"Ride your ways," said the gipsy, "ride your ways, Laird of Ellangowan—ride your ways, Godfrey Bertram!—This day have ye quenched seven smoking hearths—see if the fire in your ain parlour burn the blyther for that. Ye have riven the thack off seven cottar houses—look if your ain roof-tree stand the faster.... There's thirty hearts there, that wad hae wanted bread ere ye had wanted sunkets, and spent their lifeblood ere ye had scratched your finger. Yes—there's thirty yonder, from the auld wife of a hundred [Margaret MacKay remembered again?] to the babe that was born last week, that ye have turned out o' their bits o' bields, to sleep with the tod and the blackcock in the muirs!"

SCOTT, supra, at 65. See also, EDWARD WAGENKNECHT, SIR WALTER SCOTT 70-71 (1991).

Volume 28 1995 Number 2

### INTRODUCTION

### ANN MARIE PISCIONE\*

The idea for this Symposium was born over a year ago at the first meeting of the Centennial Committee. Although the *Indiana Law Review* had published two symposia in the form of collections of papers, a live symposium had never been hosted at the Law School. It seemed appropriate that the first symposium of this nature be held as the school was entering its second century of legal education. It also seemed appropriate that the Symposium focus on changes and developments in the law during the past one hundred years.

In 1894, when this Law School was founded, the law and the legal profession were much different than they are today. Many of the changes that have occurred during the last century are surveyed in the articles that follow. These papers were originally presented at the Symposium held on Friday, September 23, and Saturday, September 24, 1994. The contributors to the Symposium come from all over the country and the subjects presented are as varied as the authors' backgrounds. Several pages could be written about the background and expertise of each one, however space and time constraints permit only a brief overview of their topics and positions.

The first segment of the Symposium, focusing on the history of the Law School, its alumni and faculty, featured two of our own professors, Ronald Polston and William Harvey. Professors Polston and Harvey, both members of the Centennial Committee, were responsible for discovering the class composites which helped to pinpoint the founding date of the Law School. They are experts on the history of this School, not only because of their research, but also because they have more than fifty combined years of experience as faculty at this Law School.

One area of law which has undergone changes over the last century is evidence—particularly hearsay. Professor Michael Ariens, of St. Mary's University School of Law, discusses the similarities and differences in hearsay at the turn of the century compared to today. In addition, he examines the causes of those differences.

One of the most drastic changes in the past one hundred years has been that of the status of women both in society and in the legal profession. Although women have always fought battles of equality both in society and the legal profession, their approaches to that battle have varied over the years. Professor Virginia Drachman, an Associate Professor of History at Tufts University, looks at these changes in her article on the New Woman Lawyer.

Professor Lawrence Friedman, the Marion Rice Kirkwood Professor of Law at Stanford Law School, served as the keynote speaker at the Symposium Dinner held on

<sup>\*</sup> Symposium Editor, Volume 28, *Indiana Law Review*. J.D. Candidate, 1995, Indiana University School of Law—Indianapolis; B.A., 1991, University of Notre Dame.

<sup>1.</sup> A videotape of the Symposium is available for viewing from the offices of the *Indiana* Law Review.

Friday evening. He presents a "snapshot view" of life, the law and legal education one hundred years ago and contrasts it with the world today.

Professor Michael Grossberg discusses the changes in family law since the end of the nineteenth century. Family law has reflected the conflicts over some of the most fundamental issues in American society over the last one hundred years. Professor Grossberg holds two positions at Case Western Reserve University—Chair of the History Department, and Associate Professor in the School of Law.

The Warren Court played a very significant role in the history of the United States Supreme Court. In commemoration of the twenty-fifth anniversary of Chief Justice Warren's retirement from the Court, Dean Kermit Hall discusses how the Warren Court analyzed the turn-of-the-century issues that came before it and how the Warren Court's view of those issues is analyzed today. Currently, Dean Hall is the Dean of the College of Humanities and a Professor of History and Law at the Ohio State University.

Professor Louise Halper is an Assistant Professor of Law at Washington and Lee University School of Law where she focuses her teaching on property, legal history and environmental law. Her article focuses on how the principles of property law developed at the end of the nineteenth century are influencing current court decisions in the area of takings law. She particularly focuses on the recent Supreme Court case, *Lucas v. South Carolina Coastal Commission*.<sup>2</sup>

Philosophical approaches to the law have greatly impacted its development over the last one hundred years. In his article, Professor Gary Minda focuses on jurisprudential modernism and post-modernism and the impact these doctrines have had on the changes and developments in the law. Professor Minda is a Professor at Brooklyn Law School where he teaches labor law and jurisprudence, among other subjects.

Debate has raged over the last one hundred years, and will continue into the future, over the purpose and status of law schools in legal education. Professor John Henry Schlegel makes a startling suggestion: Just as spotted owls thrive in new growth forests, perhaps law students would thrive in "new growth" law schools. Professor Schlegel is a Professor at the University of Buffalo School of Law and has served as both Associate Dean and Acting Dean at various times during his tenure.

This Symposium is the result of the hard work of many people whose names may or may not appear on the masthead of the *Indiana Law Review*. Not only did the Centennial Committee, whose members are listed on page v, first propose the Symposium, they supported it throughout the planning process. In addition, they decorated both the lecture room and the banquet room with restored class composites and other historic memorabilia from the time period.<sup>3</sup> The faculty at large assisted whenever and wherever they could by, among other things, serving as respondents at the Symposium and encouraging student attendance at the Symposium. Even though Dean Lefstein's most obvious contribution was monetary, he also placed enough faith in the *Law Review* staff to step back and allow us the freedom to plan the Symposium on our own. Many others among the staff and administration were indispensable in the process of planning and hosting this huge event. A few of them are Assistant Dean Jonna Kane, Loretta Moses, Darlene Phillips, and Mary

<sup>2. 112</sup> S. Ct. 2886 (1992).

<sup>3.</sup> A special thanks to Professors Polston and Harvey for securing the original campaign banners to set the tone for the day.

Deer. Finally, our Law Review Advisor, Professor Debra Falendar, was always there to listen to us and help us through difficult times.

We were also very fortunate to have two wonderful mentors in this process. Professor Lawrence Wilkins and Professor David Papke served as our Symposium Advisors during the last year. They were responsible for much of the success of this Symposium by inviting the speakers, helping develop a list of potential respondents, keeping our faculty updated on our progress, arranging the agenda for the Symposium, serving as moderators, and even designing the Symposium program. Without them, this Symposium would not have occurred.

Finally, this Symposium was a group effort by the *Indiana Law Review*. Although not everyone participated in the official planning committee, whose members are listed on page  $\nu$ , everyone did participate in preparing for the event, from fixing up the Law Review Office to assisting the speakers during their stay. Hopefully the energy and enthusiasm generated by this Symposium will carry over in the years to come and make other events such as this one just as successful.



### Indiana Law Review

Volume 28 1995 Number 2

### **ARTICLES**

# FRAGMENTS FROM OUR FLEECE: VIGNETTES FROM 100 YEARS IN A GREAT LAW SCHOOL

WILLIAM F. HARVEY\*

"The Chief glory of every people arises from its authors," Dr. Samuel Johnson said. The chief glory of every law school arises from its graduates, its students, and its faculty. The history of the Indiana Law School, now the Indiana University School of Law at Indianapolis, is remarkable and glorious. For example, this Law School is the only law school in the Midwest which admitted women and ethnic minorities prior to 1900. This history, however, is almost unknown to the public, to historians, to Indiana University, and to Law School graduates of the past fifty years.

It is not that records do not exist or that all graduates are gone. It is, perhaps, that the Indiana Law School's history was absorbed after 1944 when Indiana University acquired the school and placed it under the administrative jurisdiction of its Law School in Bloomington, Indiana (where it remained until 1969). From that point its identity, public image and reputation were not separate from the larger University and its public representations. The matriculating student or the graduate naturally and correctly identified with the degree which was pursued, or which was awarded at graduation. In their minds and in the minds of the faculty, who eventually replaced all of the Indiana Law School faculty who remained after the 1944 transition, the Law School was Indiana University and the University was the Law School. Its earlier history did not clearly appear in their recollection; the earlier faculty were not known; the earlier Law School and its administration disappeared.

As a result, an active memory of the Law School's Great Dean in its first one hundred years was lost, too. He was Dean James A. Rohbach, the Dean for twenty-nine years and the person, by all accounts, who "saved and created" the Law School in its first fifty years. Dean Rohbach had an outstanding, practicing-attorney faculty under him.

Hopefully, in these pages, some of their major educational work will be restored. Extensive interviews were conducted with four alumni of the law school along with other research in developing the vignettes that follow. The alumni and faculty, who are discussed in these vignettes, span the entire one hundred years of the Law School's history. They provide the reader with "slices in time" and they will, I hope, create an interest about many other graduates of the Law School and their distinguished careers.

<sup>\*</sup> Carl M. Gray Professor of Law, Indiana University School of Law-Indianapolis.

<sup>1.</sup> These interviews were with William Pearcy, Class of 1926; James V. Donadio, Class of 1928; Richard H. Oberreich, Class of 1933; and Dr. John Morton-Finney, Class of 1944. The transcripts of these interviews can be obtained from the Indiana University—Indianapolis Archives, the Law School Library, or from the author. The interviews of William Pearcy and Dr. John Morton-Finney are available on videotape. Showing is restricted to the Law School and its facilities.

The selection of persons in this introduction to one hundred years is limited by space available in this publication. There are so many, many more of remarkable interest and professional greatness. Some are: U.S. Senator John W. Kern, an early faculty member of a school which became the Indiana Law School, and the Democratic Majority Leader of the U.S. Senate as America entered World War I, and his son, Judge John W. Kern, Jr., who was an outstanding faculty member and teacher; Judge Frank Richmond, a faculty member who served the United States at the Nuremberg Trials in 1946; Mr. Floyd Mattice, a distinguished counsel for the defendants at the War Crimes Trial in Tokyo, Japan in 1946; Professor John S. Grimes, a remarkable teacher, author, and faculty member between 1945 and 1977; Judge Daniel A. Manion, United States Court of Appeals for the Seventh Circuit; Judge Stanley B. Miller, U.S. Attorney for the Southern District of Indiana and Judge on the Indiana Court of Appeals, and his father before him. Mr. William B. Miller, and Judge Miller's son after him, Judge Gary L. Miller; Chief Judge William E. Steckler, of the United States District Court for the Southern District of Indiana; Judge Cale J. Holder, United States District Court for the Southern District of Indiana; Mr. John J. Dillon, Indiana Attorney General; Ms. Virginia D. McCarty, United States Attorney for the Southern District of Indiana; Ms. Kathleen Kimberly Noland, distinguished in national and international finance and the financial markets: Ms. Deborah Jean Daniels, United States Attorney for the Southern District of Indiana; Dr. Edward B. McLean, a distinguished professor at Wabash College, and Edgar D. Whitcomb, an American hero who confronted the Japanese Imperial Army at Bataan and Corregidor in 1942, Law School Class of 1950, Governor of Indiana, 1969-73. The list could continue, it seems, indefinitely.

The thoughts and experiences of the fourteen persons who appear below, along with the *First Annual Commencement in 1895*, provide either substantial information or brief revelations about the Indiana Law School in the time they were here. Their lives and the information they provide about the Indiana Law School allow us to look, if only for a moment, into parts of one hundred years of legal education. They tell us about their lives and times. They remind us that their past is the prologue to our present.

### "Vignettes"

- 1. Vice President Charles Warren Fairbanks, Law School Faculty Member, 1893-1896.
- 2. Mr. William Jennings Bryan Addresses the Law School, February 17, 1908.
- 3. U.S. Senator Frederick Van Nuys, Class of 1900.
- 4. U.S. Senator Arthur R. Robinson, Class of 1910.
- 5. Mr. William Pearcy, Class of 1926.
- 6. Mr. James V. Donadio, Class of 1928.
- 7. Mr. Richard H. Oberreich, Class of 1933.
- 8. Dr. John Morton-Finney, Class of 1944.
- 9. Chief Justice Richard M. Givan, Class of 1951.
- 10. Judge Robert H. Staton, Class of 1955.
- 11. Congressman Andrew Jacobs, Jr., Class of 1958.
- 12. U.S. Senator Daniel R. Coats, Class of 1971.
- 13. Marilyn Tucker Quayle, Class of 1974.
- 14. Vice President Dan Quayle, Class of 1974.

15. First Annual Commencement of The Indiana Law School, Wednesday Evening, May Twenty-ninth, Eighteen Hundred and Ninety-Five, (May 29, 1895), Plymouth Church, Indianapolis, Indiana.

CHARLES WARREN FAIRBANKS
Indiana Law School Faculty Member
1893-1896
Vice President of the United States
1905-1909
United States Senator
1897-1904

Charles Warren Fairbanks was born in 1852 in a small log house on an Ohio farm near Unionville, Ohio. He graduated from Ohio Wesleyan University in 1872 and was admitted to the Bar of Ohio in 1874. He was a founding faculty member of the Indiana Law School when the School opened for classes in 1894 and he remained on the faculty until 1896. Mr. Fairbanks then served as a U.S. Senator from 1897 until 1904.

In 1900, he declined the nomination of Vice President of the United States by the Republican party, principally because of his desire to be nominated President. Instead, Theodore Roosevelt accepted that nomination and became the President of the United States upon the assassination of President William McKinley.

In their years together in Indianapolis, Vice President and Mrs. Fairbanks hosted many distinguished guests. Among them were Theodore Roosevelt, William Howard Taft, Charles Evans Hughes, French General Joffre, the Premier of France, Rene Vivani, French General Foch, Booth Tarkington, James Whitcomb Riley, John Worth Kurn and Albert J. Beveridge.

Charles Warren Fairbanks again ran for Vice President of the United States as the running mate of Charles Evans Hughes in 1916. The Hughes-Fairbanks ticket lost to Woodrow Wilson after many newspapers had already printed headlines announcing a Hughes-Fairbanks victory. Mr. Fairbanks died in Indianapolis in 1918.

### WILLIAM JENNINGS BRYAN SPEAKS AT THE INDIANA LAW SCHOOL

The publication "STARE DECISIS" was published by the Indiana Law School of the University of Indianapolis. The following article is reprinted verbatim from the 1908 edition of the publication.

### A. Mr. Bryan's Visit to the Law School

February 17, 1908, was a day that will long be remembered by the students of the Indiana Law School. For two days Mr. Bryan had been an honored visitor of the city of Indianapolis and, without the knowledge of the majority of the students, arrangements had been made for him to address the school at noon of the final day of his visit. At the close of the eleven o'clock lecture the announcement that Mr. Bryan would address the school was made and immediately law and law books were forgotten in the rush to doors and windows to watch for the approach of the famed orator. At about ten minutes after twelve he arrived and was escorted to the lecture room by a committee of students. The dean introduced Mr. Bryan as "the world's greatest and most distinguished private citizen."

Mr. Bryan spoke for about ten minutes and the speech, like the speaker, was received with hearty applause. The address, which related to the moral duties of a lawyer, will, in after years, be remembered by the students of the Indiana Law School as one of the greatest of their many inspirations to uphold the honor and dignity of their chosen profession.

### B. W.J. Bryan's Speech Before the Students Of the Indiana Law School

Mr. Bryan said: "Gentlemen—I have but a moment to talk to you, as this is a number that has been added to my program since it was made up. Although I can speak but very briefly I am very glad to do so, because the law was my profession. I am not calling myself a lawyer now, however, because the statute of limitations has run against me.

"The last case I tried was tried after I had been out of practice for several years. It was a case in the United States Court. I served as a volunteer, paying my own expenses and for my own brief, etc., in order that I might appear in a case that I thought involved principles of the utmost importance.

"It was in a maximum rate case on this proposition, namely, the value of property should be not measured by what it cost, but measured by the cost of reproduction, and I have had the pleasure of seeing that principle established since that time in another case.

"I have not argued a case for more than ten years. I have left the law because I felt that I had been drawn into a larger work than the trying of cases between individuals.

"My life indicates that circumstances direct us. We plan, but circumstances will change our plan. I am still interested in the law, although circumstances have compelled me to employ myself in a different way. I am interested in the lawyer. I believe that he occupies a larger place in our civilization than even he realizes.

"I measure the life of a lawyer, not by the number of cases he has in court nor by his income, but rather by the influence which he exerts upon the community in which he is found and by his influence upon the country at large.

"The New York Tribune had an editorial some time ago ridiculing the 'cornfield' lawyer, as the composer of the Oklahoma constitution. I took occasion to defend him. The 'cornfield' (not cornfed) lawyer is the man who comes into contact with struggling humanity, the man who is moving and living among human lives. These cornfield lawyers in each community throughout the land are doing a very large work, and a work that you will not guess from the number of cases they have in court. These men are thrashing out in immediate contact every question that concerns social and communal life in the United States. No question is so small, no problem is so great that they do not grapple with it. These men held in contempt by the city lawyers, settle all the great problems in the country today before they even come to the hands of the city men.

"Your success at the bar will depend much more upon the purpose which actuates you than upon your knowledge of cases. You can acquire knowledge of cases as you need it, but you can not get a purpose out of the mere study of cases.

"For what will you practice law? To make money? If so, the law does not afford the best way of making money. But if your aim is to make money, are you going to have any scruples about how you make it? Remember that an unscrupulous man can make money in many ways, when the people do not know when or how he is making it. As I understand it a lawyer's work makes him an officer of the court, and when a lawyer has helped the client to secure all that he is entitled to he has done all that his duty requires. Show me a man who has spent a lifetime trying to obscure a line between right and wrong

and I will show you a man who has grown weaker in character year by year. On the other hand, show me a man who has done his duty as he has met it, and I will show you a man who has grown stronger year by year.

"What a lawyer needs to establish in any community is a moral character that will make men believe that when they consult him he will tell them what is the law to the best of his knowledge, and not try to give them advice that may please them.

"In Lincoln, Neb., a lawyer once told me he had found that the best way was to find what a client wanted and to advise him accordingly. Within five years he had left the city and I cannot say where he is now.

"The man who attempts to practice law in that way will practice it just long enough for the people to find him out. A man cannot afford to surrender his character for the pay that he expects to get in a particular case. You can tell what is right today, but no human being can tell what effect the doing of a right today will have upon the morrow.

"I have never had a chance to attend the annual banquet of the law school from which I was graduated twenty-five years ago until last year, when the day was set so that I might be present. I announced then that my subject would be the question that Christ asked, 'What shall it profit a man if he gain the whole world and lose his own soul?' This is a very practical question which arises in the lives of all of us as to whether we shall sell our souls for something that seems for the time being more valuable.

"Nothing will compare with a man's soul, with his status and his purpose of life, and today we need to have more lawyers who will not sell their souls. We need more lawyers who will not agree for a compensation to get people out of difficulties before they are into them. There is no conspiracy formed against a public welfare that is not formed in a lawyer's office. No such conspiracy could be carried out without the aid of lawyers who sell their brains for these purposes.

"May your purpose in life be such that your influence in the community will work for good and may we from this school have many of the better class of lawyers."

# FREDERICK VAN NUYS Class of 1900 United States Senator 1932-1944

Mr. Frederick Van Nuys was born in Falmouth, Indiana in 1874. He graduated from Earlham College in 1898 and from the Indiana Law School in 1900. He was the prosecuting attorney of Madison County, Indiana, and a member of the Indiana State Senate from 1913 to 1916. Then he served as the United States Attorney for the district of Indiana from 1920 until 1922. In 1932 he was elected to the United States Senate, where he remained until his death in 1944. In the Senate, he was the Chairman of the Committee on Expenditures in Executive Departments and he was a member of the Committee on the Judiciary.

# ARTHUR R. ROBINSON Class of 1910 United States Senator 1926-1934

Mr. Arthur Raymond Robinson was born in Pickerington, Ohio, in 1881. He graduated from the Ohio Northern University in 1901 and from the Indiana Law School in 1910. Mr. Robinson served in the Indiana Senate from 1914 to 1918. During World

War I, he served in the U.S. Army in France in the Army of Occupation. After leaving the Army as a Major, he served as a Judge of the Marion County Superior Court from 1921 until 1922. Later he was appointed to the United States Senate to fill a vacancy caused by the death of Senator Samuel M. Ralston. He was elected to the same position in 1926 and continued to serve until 1934. Mr. Robinson then practiced law in Indianapolis until his death in 1961.

# WILLIAM PEARCY Class of 1926 Currently residing in Tucson, Arizona

(On May 16, 1994, Mr. William Pearcy and I conducted a video taped interview during which we reviewed his life and recollections as a student at the Indiana Law School. He enrolled in the Fall of 1923.)

Mr. William Pearcy matriculated from Shortridge High School in Indianapolis, graduated from Butler College in 1923, and received his degree from the Indiana Law School in 1926. Because his father died when he was thirteen years old, Mr. Pearcy worked his way through both Butler University for his undergraduate degree, and law school. He attended classes from 8:00 a.m. until 11:00 a.m., and then worked in the Trust Department of a bank in the afternoons.

Mr. Pearcy has memories of a law school that was very different from the school that exists today. The total enrollment of the Law School at that time was only about 130 to 150 students, with class sizes of about fifteen to twenty-five students, where the students recited from casebooks as students do today. His fellow classmates were "there for a purpose. They wanted their legal education, and that was the dominant attitude among the students. . . . [They were] very serious. . . . They had a strong purpose."

He recalls riding a bicycle to law school—or the College Avenue streetcar when he had funds—and studying in the Supreme Court library until late in the evening. "I had no social life in law school. It was constant work. At the end of the day I would get a sandwich and go from work to the State Law Library and study." Describing then Dean Rohbach as a "gracious person, but demanding also," Mr. Pearcy fondly remembers both the faculty and the Dean: "They and he were inspirational. Dean Rohbach was a very impressive person. He was a man who gave you confidence and leadership. As I look back on it, I feel then and feel now that my life was on track when I attended law school, and because I did attend law school." The education and training he received at the School of Law have been very valuable to Mr. Pearcy over the years. "Looking back at my law school training and what I learned, I feel that my law school education, and training, and experiences prepared me for almost all of my life's experiences since that time."

JAMES V. DONADIO
Class of 1928
Senior Partner
Ice, Miller, Donadio & Ryan

(James V. Donadio is one of the truly outstanding attorneys in Indiana in the twentieth century. He has practiced for over sixty years. In an interview conducted on

October 3, 1993, he shared some of his recollections about his experiences at the Indiana Law School in the 1920s, and his thoughts about legal education.)

The central thoughts which Mr. Donadio expressed about the Indiana Law School and legal education began this way:

"I got to know about the school about 1915. I was living in Connecticut at the time. I was working for a farmer who was frequently on the Grand Jury. I heard him speak about this law school in Indiana." Another influence was Mr. Donadio's older brother. He came to Indiana and graduated from the Indiana Law School in 1917. "Prior to his death, he was the General Solicitor for the Baltimore and Ohio Railroad."

Mr. Donadio recalled the academic program: "We had 45 minute classes, from 8:00 a.m. to 1:00 p.m. The School was located in the old Columbia Security Building on the southwest corner of Ohio and Delaware Streets. There was the Dean's office and three class rooms. The faculty was outstanding, because they brought their own experiences into the cases and the law we studied. Probably the most brilliant man I knew was Prof. Kurn, who taught Corporations and Partnerships. He was remarkable. So was Dean Rohbach. If it were not for Dean Rohbach, there would be no Indiana Law School. The faculty signed our diplomas, if a course were taken from a faculty member. My Indiana Law School diploma hangs in my home."

About Dean Rohbach, I said, "This was the opinion of Dean Joe Wood, which is reported by his son, Bill Wood."

Mr. Donadio said he knew Dean Joe Wood and was very close to him, and that Joe Wood's opinion about Dean Rohbach is correct.

Mr. Donadio expanded on the legal education he received. It added a kind of apprentice training to the formal casebook education; and in this respect it was similar to the British Inns of Court. It was outstanding legal education; and there were no full-time professors.

"You see, I watched some of the giants perform, in my class room and in the court rooms. For instance, I was privileged to be permitted to have a seat in the trial lawyer area in the D.C. Stephenson trial in Noblesville, Indiana. [The defendant, D.C. Stephenson, was the Indiana leader of the Ku Klux Klan.] Judge Miller, for whom I worked in the afternoon in the Superior Court in Indianapolis, permitted me to listen to it. The prosecution consisted of Bill Remy, Ralph Kane, a special prosecutor, and Asa Smith, who obtained the affidavit that convicted D.C. Stephenson." Defense counsel were outstanding, too. They "consisted of Eph Inman, Ira Holmes and Floyd Christian."

Mr. Donadio's law school class "began with thirty-two persons, from various parts of the country. A majority came from Indiana. There were no night classes. The night school was the Benjamin Harrison Law School; we were the Indiana Law School."

Our interview concluded this way:

JD: Bill, where the hell would I have been if it had not been for that law school? That law school gave a good many common boys the opportunity to become lawyers and, present persons excluded, to become prominent.

WH: It gave them a chance, didn't it?

JD: That's right. It sure did. And a lot of them, Bill, received it without the benefit of a college education.

# RICHARD H. OBERREICH Class of 1933 Law School Faculty Member 1940 Currently Residing in Indianapolis, Indiana

(Mr. Oberreich returned to serve as an Instructor on the Faculty in 1940, as World War II pressed upon him and his colleagues. On July 17, 1994, Mr. Oberreich shared some of his recollections about the Indiana Law School, part of which appears here.)

Mr. Richard H. Oberreich graduated from the Indiana Law School in 1933. He joined the faculty as an instructor in 1940. At that time the Law School was located in an office building on the Circle in downtown Indianapolis. According to Mr. Oberreich, most of the faculty members were only part-time instructors who maintained law practices while teaching at the Law School. When Mr. Oberreich was a student, most of the faculty did not even maintain offices at the law school. They usually came and went only for class time. Because the faculty had to fit teaching into a busy law practice, the faculty members "were not students of the law in the sense that professors are today."

Mr. Oberreich recalled former Dean Forney, Dean of the Benjamin Harrison Law School from 1932-36, as a man who "was totally relaxed." He would "just talk in an ordinary voice, and it just kind of flowed out and always with good will. . . . I can't imagine that he ever raised his voice in anger or disgust."

Recently, Mr. Oberreich sat in on Professor Karlson's Criminal Law class. He noted a distinct difference from the law school classroom today compared to when he was a student. The difference in the instruction at that time was that students in his day were questioned in order to obtain the "right answer" to a question. By contrast, in today's law school, students are expected to "think on their feet . . . [and answer questions] addressed for the purpose of developing ideas and thoughts, whereas we generally wanted to get the answer, as if anybody ever knew the right answer. Professor Karlson explored their thinking and required them to expand on their thoughts in response to his initiatives."

### Dr. John Morton-Finney Class of 1944

Pd.B., Lincoln University, Jefferson City, Missouri, 1916

A.B., Lincoln University, 1920

A.B., State University of Iowa, 1922

M.A., Indiana University, 1933

LL.B., Lincoln University, 1935

J.D., Indiana Law School, 1944

Litt.D., Lincoln University of Missouri, 1985

L.H.D., Butler University, 1989

LL.D., Martin University, 1991

Awarded, Educational Service, by President George Bush, presented at the National Teacher of the Year Ceremony, The White House, 1990 Awarded, Sagamore of the Wabash by Indiana Governor Evan Bayh, 1990 Commissioned as a Kentucky Colonel by Kentucky Governor Brereton C. Jones, 1994 Buffalo Soldier, 24th Infantry Regiment, U.S. Army 1911–1914 (Philippine Islands)

Soldier, U.S. Expeditionary Force, 1918
(France)

Honorary Member, 9th and 10th (Horse) Cavalry Regiments
(Buffalo Soldier Regiments, U.S. Army, 1994)

Life Member, American Legion

(On May 19, 1994, Dr. John Morton-Finney and I conducted a video taped interview during which we reviewed his remarkable life, and his recolletions of the Indiana Law School. The following summary and comments are taken from that interview.)

Almost immediately we began to discuss his educational experiences in Missouri, where he had moved from Kentucky, to live, at first, with his grandfather. While living with his grandfather, he arose early, tended to the horses and other farm animals, and then walked six miles to school and arrived at 8:00 a.m. for class. In the evening he walked home. Very soon we began to speak about his college life and the great teachers he had at Lincoln University in Jefferson City, Missouri.

Dr. Morton-Finney said that after he graduated from Lincoln University in Jefferson City, Missouri, he taught school grades one through eight in a one-room school house in Nelson, Missouri. Before this experience, he said, there was a teacher at Lincoln University who was simply outstanding. "She was the finest I ever knew," he observed. She taught Latin. After his initial year she said he could also take Greek. He loved languages and wanted to teach them. Years later, he became the Chairman of the Department of Languages at Crispus Attucks High School in Indianapolis, a position he held for over thirty years. His department offered Latin, Greek, German, French and Spanish, each of which he spoke, wrote, and taught.

"Each person," we agreed, "must have a great teacher." He recalled his language teacher at Lincoln University in Missouri, who taught him before he entered the army in World War I.

As we spoke, I thought, "was that great teacher more influential on him than his father, who insisted that he enroll in school at the age of six? Or was it his mother, for whom he still shows his love in the 104th year of his life as he speaks about her? His mother was, he said, a free black. But his father's family was made free by the Civil War. It was his father who insisted on education, and it was, perhaps, his father's influence which caused him to 'follow the train whistle from Kentucky to Missouri' where he found, he remembered, better schools than in Kentucky." I thought, "This wonderful man is a great teacher. He has been teaching each day of his adult life, wherever he might be. He is a great teacher because he has something to teach; he has acquired a tremendous amount of information and he can explain it. A master teacher. Yes, that's it." When speaking to Dr. John Morton-Finney, the sensation occurs that you are in the presence of a master teacher.

I asked, "where did you learn French?" "In the trenches," he said, "in France in the War." He remembered a book which translated English to French. It was given to American troops in the Expeditionary Force which went to France. He was drafted into the Army from the State of Missouri. To this day he proudly wears a medal awarded by Missouri to its sons who well served their Country and their State in World War I. The medal says that it is presented by Missouri to those who fought in the "WAR WITH GERMANY."

He remembered the moment he obtained the book: "I bent over, put my hand in the water in the trench, and picked up that book. But you had to be very careful because the Germans used gas. It mixed with that water and it could burn you badly even in the water."

WH: Did you study during the rest of your time in France?

M-F: Yes. I put my book in my haversack and I kept it with me wherever I marched. I took it out and read it and studied it. By the time I left France I could read French newspapers, and I read a history of France in French. So I got along rather well in French.

He returned to Lincoln University and to formal instruction in French, a language he mastered. As we spoke about the French language, he paused and spoke about his wife. She became his French teacher after World War I, at Lincoln University. Her name was Pauline Ray. She had been a teacher at Tuskegee with Booker T. Washington. They were devoted to each other during the many decades of their marriage before her death. His beautiful words about her moved from English to French then to English. He said that he always referred to her in the French words for "My Angel." I thought, "Then, now, and always, because she is still with him; she inspires him still."

Our conversation turned to the Indiana Law School. In 1922, he moved to Indiana, "with a contract to teach in my pocket," he said. He sought enrollment in the Benjamin Harrison Law School because he worked during the day. At that time, he held two degrees from Lincoln University, a degree from the State University in Iowa, and an M.A. from Indiana University. He spoke to Dean William Forney, for whom he has the fondest memory. He explained that he had been reading Blackstone's *Commentaries on the Law*, and he wanted to enroll. Dean Forney made every effort on his behalf, but his initial attempt to enroll at Benjamin Harrison was denied. Later the Benjamin Harrison Law School was acquired by the Indiana Law School, and Dean Forney was then the dean of the night school division at the Indiana Law School by Dean Forney.

"Dean Forney spoke so well," he said. "He had such a fine presence and command of his subjects, and had taught his course in Evidence for over thirty-two years." He remembered: "He was a large man and very affable. He had an impressive voice. He said he developed that voice after his problems with his lungs when he was younger."

As he spoke about Dean Forney, this thought about Dr. Morton-Finney returned to me: "He is a wonderful scholar and student not only of the subjects in which he enrolled, but of the persons and personalities who taught those subjects. He remembers the teachers as well as the subject of the course." The classroom strength and guidance in their personalities, it seemed, are as important as the content of their courses. "Or is it that this remarkable mind has not forgotten a thing he has heard or seen, and Dean Forney is as alive to him as I or the man behind the camera?" He continued to speak: "He asked me to give a recitation on the Dred Scott Case. I did this, even though that case is nearly a book to itself," he said. After this recitation both Dean Forney and members of the class congratulated him on the excellence of it. "Do you know that case?" he asked. "Yes," I said, "I know that case well." "Well, then I want to tell you a story," he said.

He explained that a few years after that recitation he went to St. Louis, Missouri and visited the courtroom where the *Dred Scott* trial occurred. The court house was very old, he noted, and good for this purpose and no other. "All the floors squeaked," he

remembered. He said that a trial was being conducted, and the sitting judge was a black man. He wanted to be in the room where that case began; a case about which, almost eighty years later, he would recite.

I wanted more time with him. Much longer than the hour or so we had. An amazing and great life, but we could not cover all of his experiences.

"You were a Buffalo Soldier, weren't you?" I asked.

"Yes," he answered. "I was in the Twenty-fourth Infantry, U.S. Army, 1911-1914" and this was a Buffalo regiment. "I have received an award by the Buffalo Soldier Committee, Ft. Leavenworth, Kansas, as the oldest surviving Buffalo Soldier."

"There were four Buffalo Soldier Regiments, the Twenty-fourth and Twenty-fifth Infantry, and the Ninth and Tenth Cavalry Regiments. These came from the Civil War, and they fought in the Plains Wars."

He continued saying, "I was sent to the Philippines with the Twenty-fourth Infantry.
... We saw duty at Manila, on Corregidor, and in other parts of the Philippines."
"Have you been there, professor?" "Yes," I said, "but it was a different time and a

"Have you been there, professor?" "Yes," I said, "but it was a different time and a different war." Then he spoke about a memorial in Manila, and the dedicatory words placed on it. He recited those words, and asked me if I had seen the same memorial. I said that I doubted it because of the terrible damage done to Manila by the Japanese; probably it did not survive.

"My second tour of duty was in the American Expeditionary Force, and I was drafted into that army," he said. In World War II, he was in charge of a Rationing District in Indianapolis.

I wished we might have continued for hours, but soon our hour ended and we stopped. It was an honor to be in his presence: a great scholar, a great student, and a great teacher. His commitments to study and the acquisition of knowledge are matched only by his enormous pride in America. He loves his country, which he has served so long and so well. He loves the schools he has attended, and his law school—the Indiana Law School, now with Indiana University in Indianapolis.

JUSTICE RICHARD M. GIVAN
Class of 1951
Justice, Supreme Court of Indiana
1968-1994
Chief Justice, Supreme Court of Indiana
1974-1987

Richard M. Givan was born in 1921. During World War II, he served as a pilot in the United States Army Air Corps. After graduating from the Law School in 1951, he served as an Assistant Attorney General of Indiana and argued cases in both the Indiana Supreme Court and the Supreme Court of the United States. He was also a deputy prosecutor in Marion County, Indiana. In 1968, Justice Givan was elected to the Indiana Supreme Court where he served as the Chief Justice from 1974 until 1987. Justice Givan retired from the Indiana Supreme Court, effective December 31, 1994.

Justice Givan is a fourth generation lawyer in Indiana. His great-grandfather, Noah S. Givan, was a Circuit Judge in Dearborn County before 1900. His grandfather, Martin

J. Givan, was a noted Dearborn County trial lawyer. His father, Clinton H. Givan, was the Judge of the Marion Superior Court, Room Four.

JUDGE ROBERT H. STATON
Class of 1955
Indiana Court of Appeals
1971-

Robert H. Staton was born in 1926. In World War II he was in the United States Army Special Combat Forces in Europe, Fifth Army. He is a graduate of Indiana University and of the School of Law in 1955. He was the Chief Trial Deputy Prosecuting Attorney for the Nineteenth Judicial District, a former Administrative Judge before the Indiana Public Service Commission, and the senior partner of a law firm. He was also the first editor of the Indiana State Bar Association Journal, *Res Gestae*.

Judge Staton has served on the Indiana Court of Appeals since 1971. During his tenure he has written over two thousand opinions. He has a very distinguished record of service to the Bench and Bar in Indiana, with a special concentration on continuing legal education that resulted in the Indiana Supreme Court's adoption of rules on mandatory continuing legal education.

He is very committed to legal education, to his Law School and to Indiana University, and he was awarded the Maynard K. Hines Medal from Indiana University for his outstanding contributions to the Law School and the University. Judge Staton has also been named a Sagamore of the Wabash by Governor Otis Bowen. He and his late wife have two daughters who are also graduates of the Indiana University Schools of Law.

ANDREW JACOBS, JR.
Class of 1958
United States House of Representatives
1965-1973 & 1975-

Andrew Jacobs, Jr., was born in Indianapolis in 1932. After high school he served in the United States Marine Corps in the Korean War. After the War, he returned to Indiana University, from which he graduated in 1955. He then received his degree from the Law School in 1958. He practiced law in Indianapolis and served in the State Assembly in 1959 and 1960. In 1965 he was first elected to the United States House of Representatives in 1965 and served until 1973. He was then reelected in 1975 and has continued to hold that office.

DANIEL RAY COATS
Class of 1976
United States House of Representatives
1981-1989
United States Senator
1989-

Daniel Ray Coats was born in Jackson, Michigan in 1943. He graduated from Wheaton College in 1965 and served in the U.S. Army from 1966 to 1968. He received his J.D. from Indiana University School of Law—Indianapolis in 1971. During law

school he served as an Associate Editor of the *Indiana Legal Forum*, which was the predecessor of the *Indiana Law Review*.

After being admitted to the Bar in 1972, Senator Coats practiced law in Fort Wayne, Indiana. He was elected to the United States Congress in 1981 and served until 1989, when he was appointed to the Senate to complete the term of Vice President Quayle. Senator Coats was reelected to the Senate in 1992.

# MARILYN TUCKER QUAYLE Class of 1974 Partner, Krieg, DeVault, Alexander & Capehart

Marilyn Tucker Quayle was born in Indianapolis, Indiana. She received a Bachelor degree in Political Science from Purdue University. She then graduated from the School of Law in 1974. After graduation she practiced law in Huntington, Indiana, before moving to the Washington, D.C., area while her husband, Dan Quayle, was a member of Congress, a U.S. Senator, and the Vice President of the United States.

While in Washington, Mrs. Quayle served on the Board of the Federal Emergency Management Agency and as Chairperson of the International Disasters Advisory Committee for the Agency for International Development. She also works with the National Cancer Institute as a principal spokeswoman for the Institute's Breast Cancer Summits. She serves on the United Nation's Special High Level Council for the International Decade of Natural Disaster Reduction.

J. DANFORTH QUAYLE
Class of 1974
Vice President of the United States
1989-1993
United States Senate
1981-1989
United States House of Representatives
1977-81

"THE BARRISTER" was a monthly student publication during the regular school year. In October 1970, when the new law school building of that year was first occupied, a commemorative issue of this publication was devoted to the new building. One of the student editors of "THE BARRISTER" was J. Danforth Quayle. This is a reproduction of his article about the law school and the new building.

### UPWARD BOUND<sup>2</sup>

Today is a proud day for the administration, the faculty, and the student body of the Indiana University Indianapolis Law School. Dignitaries from local, state, and national affairs are gathered to dedicate our law school. During the two day ceremony, acknowledgments of our past achievements and the prognostication of our future will be voiced by various speakers.

Though we are indeed on the upward road of progressiveness, our law school will only remain strong through the determination of the school's personnel. The responsibility of having a viable atmosphere is greatly dependent on the student body itself. Though Indianapolis Law School has a distinguished reputation, a malaise of student apathy can quickly lessen our achieved status.

Our school has initiated a clinical urban program where the student has an opportunity to apply his classroom acquired skills to the urgent need of urban development. To our knowledge this program is the most extensive on-the-job-training approach to urban problems in the country. The Student Bar Association is generating enthusiasm among the student body to become more involved in law school activities. Presently SBA is assigning committee members to organize and produce constructive programs for student involvement. These committees will be a student-faculty committees and are open to any interested law student. This is the first issue of the BARRISTER which, hopefully, will become a monthly publication. The responsibility of a newspaper is to report news to law students to insure a well informed student body. Phi Alpha Delta and Phi Delta Phi are two good legal fraternities which afford the student a social atmosphere to acquaint oneself with fellow students. In December, the *Legal Forum* will publish its fourth volume. The Law School Republicans and Democrats are both organized and plan to assist each senior party on election day.

The choice is ours. The movement of Indianapolis Law School is upward bound—let's keep it that way!

### FIRST ANNUAL COMMENCEMENT OF THE LAW SCHOOL

The first commencement of the new Law School took place on May 29, 1895. The following is a representation of the program from that historic event.

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### Graduates



James Benton Belknap Roswell H. Carter Frank Claypool Cutter Isidore Feibleman Edward Everett Gates Charles Hamblen George Edgar Hume Francis Crump Lucas Harry & McMichael James William Noel Herbert Brown Painter Frank Sylvester Rawley Willis Phoads John C. Ruckelshaus Hugh D. Wickens Marshal Williams

Horace Lycurgus Burr William Robert Clark William C. Daly Frank N. Fitzgérald Thomas M. Genolin Clarence L. Holcomb Sylvan W. Kahn John William McCormick Omer U. Newman John W. Oliver Edward Benjamin Raub William P. Reagan Fred O. Ritter Ruple Dix Smith Samuel R. Waters William Albert Yarling

# Order of Exercises

Organ Solo,	. William II. Donely
Invocation, Fre	ederick E. Dewhurst
Address, The Lawyer of the Future,	Addison C. Harris
Harp & olo,	Myrtle Hart
Delivery of Diplomas,	Byron K. Elliott
Harp Solo,	Myrtle Hart
Announcement of Prizes,	William D. Fishback

### **Faculty**

Byron K. Elliott, President
William P. Fishback, Dean
Addison C. Harris
John R. Wilson
Charles W. Fairbanks

## HISTORY OF THE INDIANA UNIVERSITY SCHOOL OF LAW—INDIANAPOLIS

RONALD W. POLSTON\*

#### INTRODUCTION

The Indiana University School of Law—Indianapolis ("Law School") had its formal beginnings as a private, unaffiliated law school known as the Indiana Law School. It was organized in 1893, but took its first class in the 1894-95 school year. Shortly after it was organized, it became a part of the ill-fated University of Indianapolis movement. It was also affiliated with Butler University for a time. It operated as the Indiana Law School until it became a part of Indiana University in 1945. From 1945 until 1968 it functioned as the evening division of a single law school of which the Indiana University School of Law in Bloomington was the day division. From 1968 until the present it has been an autonomous law school with both a full-time and part-time division. It is the largest law school in Indiana.

Such a barebones chronology, while accurate, does not begin to tell the story of the Law School, however. It does not tell of the roots which may go much deeper into Indiana history nor the people and events that shaped it into the great institution it is today.

#### I. DEEPER ROOTS

#### A. The Depauw School of Law

There are at least two possible branches to the root system of the Indiana University School of Law—Indianapolis. One of those branches goes back to the formation of the Department of Law of Depauw University in 1853. That department functioned with interruptions, caused by the Civil War and periods of economic recession, until 1894, when it closed for the final time. It was sometimes known as the School of Law of Depauw University. The interruptions experienced were not unusual in Indiana legal education. The School of Law in Bloomington, for example, was closed for a thirteen-year period from 1876 to 1889.

The legal education tradition that the Depauw University School of Law represented did not end with its closing, however. In fact, it was not even interrupted by that event. Four of its faculty members, all very prominent Indiana lawyers, became the nucleus of the Indiana Law School, which began classes the next school year. They were William Fishback, Byron K. Elliot, William F. Elliot, and John L. Griffiths.<sup>4</sup> Charles W. Fairbanks, another of the founding faculty of the Indiana Law School, was a trustee of

<sup>\*</sup> Professor, Indiana University School of Law—Indianapolis since September 1965. Professor Polston served as Assistant Dean of the Law School from 1968-1971. He is a graduate of Eastern Illinois University (1959) and the University of Illinois College of Law (1958).

<sup>1. 2</sup> COURTS AND LAWYERS OF INDIANA 480-81 (Leander J. Monks et al. eds., 1916).

<sup>2.</sup> CATALOG OF DEPAUW UNIVERSITY SCHOOL OF LAW, 1889-90.

<sup>3. 2</sup> COURTS AND LAWYERS OF INDIANA, supra note 1, at 476-77.

<sup>4. 2</sup> COURTS AND LAWYERS OF INDIANA, supra note 1, at 481.

Depauw University, but it is not known if he lectured at Depauw.<sup>5</sup> These persons were, in fact, prime movers in the organization of the Indiana Law School.<sup>6</sup>

These five faculty members could probably claim as much distinction in their field as any comparable group in any law school in the United States. The most prominent among them was Charles W. Fairbanks, who later became a United States Senator and Vice President of the United States under Theodore Roosevelt.<sup>7</sup> Some believed that he was bound for the Presidency until he came out on the wrong side of the Prohibition issue. He apparently damaged his political career when, at a reception for president Roosevelt in his home here in Indianapolis, he served cocktails.<sup>8</sup>

William Fishback, dean of the new Indiana Law School, had been the law partner of President Benjamin Harrison. The two Elliots were prolific writers, having produced many volumes of legal texts. In John L. Griffiths served as U.S. Consul to Great Britain where he became a celebrity to the British. His home on North Delaware, a prominent Indianapolis landmark, is known as the Wedding Cake House. His picture, with a short description of his career, is displayed in his home.

#### B. The Central Law School

Another branch, or perhaps other branches, of the root system of the Indiana University School of Law—Indianapolis is represented by a lawyer training program. The training program occasionally had a formal organizational structure and was known under various names. Best remembered as the Central Law School, the training program has had some continuity of existence since 1858.<sup>12</sup> During the era where lawyers were trained in law offices, this program offered a combination of office training and formal legal education. This program was formally structured from 1871 until 1875, when it functioned as the Law Department of the Northwest Christian University, <sup>13</sup> now known as Butler University. The training program's relationship with Northwest Christian University ended when that university moved to its Irvington campus.<sup>14</sup> The program later became an independent entity when it was reorganized as the Central Law School in 1878.<sup>15</sup> It is likely that this program was the forerunner of, or at least the name appears to have been perpetuated in, the American Central Law School, which was one of the schools that later became a part of the Indiana Law School.

- 5. 3 COURTS AND LAWYERS OF INDIANA 1154 (Leander J. Monks et al. eds., 1916).
- 6. CIRCULAR OF INFORMATION, INDIANA LAW SCHOOL, INDIANAPOLIS, FOR THE YEAR 1894-95 (1894) [hereinafter CIRCULAR OF INFORMATION].
  - 7. 3 COURT AND LAWYERS OF INDIANA, supra note 5, at 1153.
  - 8. Ray Boomhower, The Fatal Cocktail, TRACES, Winter 1995, at 14.
  - 9. CHARLES W. TAYLOR, BENCH AND BAR OF INDIANA 246 (1895).
  - 10. See infra notes 94-98 and accompanying text.
- 11. For details of his experience in England as Consul, see Hoosier Consul Praised, INDIANAPOLIS STAR, June 13, 1909, at 13. For highlights of his other accomplishments, see Bar Association Drafts Tribute, INDIANAPOLIS STAR, June 2, 1914, at 5.
  - 12. TAYLOR, supra note 8, at 167.
  - 13. TAYLOR, supra note 8, at 167.
  - 14. TAYLOR, supra note 8, at 167.
  - 15. TAYLOR, supra note 8, at 167.

Some other sources note the connection between the Indiana Law School and the lawyer training program discussed above. An 1895 publication, called the *Bench and Bar of Indiana*, <sup>16</sup> discussed the history of legal education in Indianapolis. The publication noted the founding of the Indiana Law School in 1894 and, in the same paragraph, described the legal education tradition which had been known for a time as the Central Law School. There is further evidence of the connection between the Indiana Law School and the Central Law School both the Central Law School and the Indiana Law School were, at one time, connected to Butler University. Furthermore, Byron K. Elliot, one of the principal parties in the Central Law School movement, <sup>17</sup> was also a founder and the first president of the Indiana Law School. <sup>18</sup>

Perhaps the most direct evidence of the fact that the roots of this Law School begin with the Central Law School is found in the biography of Merrill Moores in the *Biographical Directory of The United States Congress 1774-1989: Bicentennial Edition.* It states that Congressman Moores graduated from "the Central Law School of Indiana (now Indiana Law School) at Indianapolis in 1880." Mr. Moores served in Congress from 1915 to 1925. His brother C. W. Moores, who also graduated from the Central Law School, was a member of the faculty of the Indiana Law School from 1896 until 1922. It is not known if the information contained in the congressional biographical directory was supplied by the congressman himself, but, if it was, the fact that his brother C.W. Moores was on the faculty of the Indiana Law School suggests that the congressman would have had more than a casual understanding of the relationship between the two schools.

#### C. The Early Years

The first advisory trustees of the Indiana Law School included many prominent Indiana residents. Among them were former President Benjamin Harrison and industrialist Eli Lilly.<sup>22</sup> Those same persons were also involved in the movement to establish a University of Indianapolis,<sup>23</sup> which came to fruition in 1896 with the banding

- 16. TAYLOR, supra note 8, at 167.
- 17. CATALOGUE AND REGISTER OF THE CENTRAL LAW SCHOOL, 1880-81.
- 18. CIRCULAR OF INFORMATION, supra note 6.
- 19. JOINT COMMITTEE ON PRINTING, CONGRESS OF THE UNITED STATES, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989: BICENTENNIAL EDITION 1528 (1989) [hereinafter BIOGRAPHICAL DIRECTORY].
- 20. C.W. Moores is listed as a faculty member in the CATALOGUE OF THE INDIANA LAW SCHOOL, 1921-22 [hereinafter referred to as CATALOGUE without cross-reference] and as a special lecturer in CATALOGUE, 1922-23. Both Merrill Moores and C.W. Moores were uncles of Merrill Moores, who graduated from this Law School in 1953, and great-uncles of Merrill Moores' children Marilyn Ann Moores Burge ('81) and Merrill Moores ('88).
- 21. The "most thorough and systematic revision of biographical entries" occurred in 1927. BIOGRAPHICAL DIRECTORY, *supra* note 19, at 2. This year, of course, was only two years after Congressman Moores left Congress and two years before his death in 1929. It therefore seems likely that the information was obtained from him.
  - 22. CIRCULAR OF INFORMATION, supra note 6.
  - 23. EDWARD A. LEARY, INDIANAPOLIS: THE STORY OF A CITY 137 (1971); HENRY K. SHAW, HOOSIER

together of the Indiana Law School, Butler University (which became Butler College to accommodate the new arrangement),<sup>24</sup> the Medical College of Indiana, and the Indiana Dental College.<sup>25</sup> The movement generated a great deal of enthusiasm. "The students marched through the streets giving college yells and flying college colors. The suggestion was in many minds: here is the nucleus for a great university." However, the enthusiasm was never translated into a binding union of the four schools involved. After the Medical School dropped out in 1905, it was absorbed by Purdue University, and later transferred to Indiana University.<sup>27</sup> Although one writer states that the University of Indianapolis was dissolved by 1910,<sup>28</sup> catalogues of the Law School continue to show the university in existence for many years thereafter,<sup>29</sup> and Butler did not resume the status of a university until 1922.<sup>30</sup> There remained, however, a loose association of the Law School with Butler University until the merger of the Law School with Indiana University.<sup>31</sup>

The Indiana Law School maintained a full-time day program from the time of its founding until it became a part of Indiana University in 1944.<sup>32</sup> In 1898, an evening

DISCIPLES 271 (1966).

- 24. SHAW, *supra* note 23, at 350.
- 25. SHAW, *supra* note 23, at 271.
- 26. INDIANA LAW STUDENT 26 (1896).
- 27. A Brief History of The Indiana University School of Medicine 4 (1994).
- 28. CLIFTON J. PHILLIPS, INDIANA IN TRANSITION 427 (1968).
- 29. CATALOGUE, 1935-36, contains the following statement: "Formerly the Indiana Law School stood as a unit in a group of various schools which together formed the University of Indianapolis. A series of mergers by the schools belonging to the University of Indianapolis with other universities left the Indiana Law School the only remaining unit of the former group. Today the Indiana Law School is still considered a part of the University of Indianapolis, and degrees and diplomas are conferred by authority of the Trustees of the University." See infra note 32.
  - 30. SHAW, *supra* note 23, at 349.
- 31. Shaw, *supra* note 23, at 352. From at least as early as 1925, students at Butler University could combine their senior undergraduate year with their first year at the Indiana Law School. *See infra* note 115. Beginning with the CATALOGUE, 1941-42, the statement, "Affiliated with Butler University" appears on the cover. Earlier catalogues simply showed the Law School as being "associated" with Butler University. *See* CATALOGUE, 1926-27.
- 32. See CATALOGUES 1894 through 1944. Copies of the catalogues for the following years may by found at the Indiana State Library: 1894-95; 1895-96; 1896-97; 1903-04; 1905-06; 1931-32; 1935-36; 1936-37; 1937-38; 1938-39; 1939-40; 1940-41; 1941-42; 1942-43; 1943-44. Catalogues for the following years may be found in the library of the Indiana University School of Law—Indianapolis: 1894-95; 1895-96; 1896-97; 1897-98; 1899-1900; 1900-01; 1901-02; 1902-03; 1903-04; 1904-05; 1905-06; 1908-09; 1909-10; 1910-11; 1911-12; 1912-13; 1913-14; 1914-15; 1915-16; 1916-17; 1920-21; 1922-23; 1925-26; 1926-27; 1931-32; 1933-34; 1934-35; 1936-37; 1937-38; 1938-39; 1939-40; 1943-44. From 1900-01 through 1931-32, the covers of the catalogues indicate both the school year of issuance and the succeeding school year. Thus a catalogue issued in 1900-01 would indicate that year as the year of issuance and then add: "With Announcements of the Faculty and Course of Study Nineteen Hundred One Nineteen Hundred Two." The above listing gives the year of issuance.

school was organized and known as the Indianapolis College of Law.<sup>33</sup> In 1909, a second evening school known as the American Central Law School began operations.<sup>34</sup> The faculty members of the second evening school were defectors from the Indianapolis College of Law. In 1914, the two evening law schools merged and began their joint operation under the name of the Benjamin Harrison Law School.<sup>35</sup> Thereafter, the Benjamin Harrison Law School and the Indiana Law School worked very closely together, almost as if they were two divisions of the same school, with the Indiana Law School as the full-time day division and the Benjamin Harrison Law School as the part-time evening division. In 1936, the two formally merged and thereafter operated as the Indiana Law School.<sup>36</sup>

The evening schools were staffed by a distinguished faculty from the very beginning. Judge U.Z. Wiley was listed as the dean of the Indianapolis College of Law and J.W. Kern was its president.<sup>37</sup> The best known of the evening school faculty, Kern was a vice presidential candidate, the running mate of William Jennings Bryan in 1908. He later became a United States Senator and Senate Majority Leader until his death in 1917.<sup>38</sup> If the day and evening schools are considered as a single institution, then this Law School had the distinction of having its two divisions alternate in supplying a vice presidential candidate at the national level in three presidential elections. Charles W. Fairbanks was elected in 1904 and ran again in 1916 on the Republican ticket. John W. Kern ran as a Democrat in 1908. Thus when Dan Quayle, a graduate of this Law School, burst onto the

<sup>33.</sup> While the beginning date for the Indianapolis College of Law is said to be 1898, *see infra* note 35, the biographical sketch of Congressman Joseph Bonaparte Cheadle, who represented Indiana in the United States Congress from 1887 to 1891, indicates that he graduated from "the Indianapolis Law College in 1867." BIOGRAPHICAL DIRECTORY, *supra* note 19, at 769. This suggests that both the Indianapolis College of Law and the American Central Law School may have been continuations of existing law training programs. If that were true, it might also explain why no beginning date for the American Central Law School is ever given.

<sup>34.</sup> The CATALOGUE OF THE BENJAMIN HARRISON LAW SCHOOL, 1920-21, contains the following statement: "The Benjamin Harrison Law School . . . is the successor of the Indianapolis College of Law and the American Central Law School. The former was organized in 1898 and the latter a few years subsequent thereto." Other publications are similarly uncertain as to the date of founding the American Central Law School. See, e.g., 2 COURTS AND LAWYERS OF INDIANA, supra note 1, at 483 (giving substantially the same statement as quoted above from the CATALOGUE OF THE BENJAMIN HARRISON LAW SCHOOL). However, the first composite of a graduating class of the American Central Law School which is now in possession of this Law School is from the year 1910. Theopholis Moll appears as a faculty member in that picture. He appears as a faculty member in a class composite of the 1909 graduating class of the Indianapolis College of Law, but does not appear in the class composites of that school thereafter. Apparently, he was one of the founders of the American Central Law School which suggests that the opening date of the school was the fall of 1909.

<sup>35.</sup> The CATALOGUE OF THE BENJAMIN HARRISON LAW SCHOOL issued for the year 1915-16 school year, which was called a yearbook, lists a graduating class for 1914, but the persons shown in that list are also pictured in the graduating class composites for the American Central Law School and the Indianapolis College of Law for 1914. Apparently the merger occurred after the close of the 1913-14 school year.

<sup>36.</sup> Two Law Schools Arrange Merger, INDIANAPOLIS NEWS, April 25, 1936, at 1.

<sup>37.</sup> See Composite Photo for Class of 1908, Indianapolis College of Law (available at the Indiana University School of Law—Indianapolis).

<sup>38. 1</sup> WHO WAS WHO IN AMERICA 1897-1942 at 670 (1943).

national scene in 1988, he followed in a long-established tradition in which representatives of this Law School served in the United States Senate and then became vice presidential candidates.

Neither the Indiana Law School nor the Benjamin Harrison Law School had permanent quarters until after their merger in 1936. Previously, the Indiana Law School occupied space in office buildings in the downtown area. Originally located at 71 West Market Street,<sup>39</sup> the School was also housed in the YMCA Building on North Illinois,<sup>40</sup> the fourth floor of the Talbot Block on the Northwest Corner of Pennsylvania and Market Street,<sup>41</sup> and the third floor of Castle Hall on East Ohio between Delaware and Alabama Streets.<sup>42</sup> The Benjamin Harrison Law School occupied space in the Lemke Building at the Northeast corner of Market and Pennsylvania Streets for most of its early existence. In 1931, the Benjamin Harrison Law School moved to the State Life Building. After the 1936 merger, the newly created Indiana Law School, which now had both day and evening divisions, occupied the third floor of the State Life Building. In 1938, the School purchased the Wheelock House, located at 1346 North Delaware.<sup>43</sup> It was the first facility owned by the Law School and the catalogues of the Law School proudly showed pictures of the new building from three angles.<sup>44</sup> Those pictures remained a part of the Catalogue until the association of the Indiana Law School with Indiana University in 1945.

#### D. The Affiliation with Indiana University

As a result of financial problems brought on by the great depression, World War II, and the low demand for lawyers at that time, the Indiana Law School found it necessary to seek the security of association with Indiana University. In 1944, a merger agreement was reached in which the Indiana Law School became the part-time evening division of the Indiana University School of Law. The agreement provided that the admissions policies of the two schools would be the same and that the Indianapolis Division would be headed by an associate dean. Henry Witham, a member of the faculty of the University of Tennessee School of Law, was recruited as the associate dean. The agreement also provided that William Forney and James Ogden, two longtime members of the faculty of the Indiana Law School, would be retained as members of the faculty of the new division. In addition to the full-time staff, eleven part-time instructors were engaged to conduct classes. The part-timers included John S. Grimes, General Counsel of the Indiana Farm Bureau, and Cleon H. Foust, a Deputy Attorney General, Tothe of whom would become full-time members of the faculty in 1948 and 1949 respectively. In addition, two

- 39. CATALOGUE, 1894-95.
- 40. CATALOGUE, 1903-04.
- 41. CATALOGUE, 1909-10.
- 42. See CATALOGUE, 1912-13.
- 43. Indiana Law School Gets New Quarters, INDIANAPOLIS NEWS, June 22, 1938, at 6.
- 44. See CATALOGUES, 1938-39 through 1943-44.
- 45. Law School Merger Furthers 102-Year-Old I.U. Tradition, THE INDIANA DAILY STUDENT, Nov.
- 29, 1944, at 3 [hereinafter Merger].
  - 46. *Id*.
  - 47. Id.
  - 48. DIRECTORY OF LAW TEACHERS 1985-1986 at 374 (1985).

members of the Bloomington faculty, Dean Bernard Gavit and Professor Frank Horack, were to teach several classes.<sup>50</sup> In 1945 and 1946, two young law teachers were added to the full-time staff: Ben Small and R. Bruce Townsend.<sup>51</sup> Both played important roles in the growth of the school in later years. Other members of the early faculty who later achieved distinction in the field of legal education were Lester Orfield<sup>52</sup> and Charles Kelso.<sup>53</sup>

Shortly after the affiliation with Indiana University, the Law School moved into new quarters. The University purchased the Mannechor Building which was located at the corner of Illinois and Michigan Streets, and the Law School occupied it in 1947.<sup>54</sup> The beautiful and historic old building was constructed as a German cultural center in the late nineteenth century and was a companion building to the Atheneum, since both were of the same architectural style.<sup>55</sup> The Atheneum still stands, but the Mannechor Building was torn down shortly after it was vacated by the Law School. However, many of the artifacts from the Mannechor Building were brought to the current facility, including an elaborate hand carved fireplace mantel which was installed in the Barristers Room in the library of the current facility.

Although the Indianapolis Division was to be a part of a single Indiana University School of Law headed by an associate dean, such an arrangement never materialized. The school remained, de facto, a separate institution, the Indiana Law School. There was little interchange between the two divisions of the school, and it was not long before the Indianapolis Division began making plans for resuming a full-time program and building a new facility.<sup>56</sup> Those plans were vigorously pursued under the leadership of both Ben Small, who succeed to the associate deanship upon the retirement of Henry Witham in 1960, and R. Bruce Townsend, whose dynamic personality dominated the faculty. The distance between the two divisions of the Law School<sup>57</sup> was underscored by the fact that

- 49. Id. at 326.
- 50. Merger, supra note 45.
- 51. DIRECTORY OF LAW TEACHERS 1965 at 316, 338 (1964).
- 52. Professor Orfield joined the faculty in 1952. *See* DIRECTORY OF LAW TEACHERS 1965, *supra* note 51, at 267.
- 53. Professor Kelso joined the faculty in 1951. *See* DIRECTORY OF LAW TEACHERS 1965, *supra* note 51, at 199.
  - 54. Landmark Will House Law School, INDIANAPOLIS STAR, Jan. 19, 1946, § 1, at 1.
  - 55. Id.
- 56. On August 9, 1951, Professor Kelso proposed at a faculty meeting that the Law School seek space in the proposed new City-County Building, but the faculty rejected that plan. Faculty Minutes, August 9, 1951 [hereinafter referred to as Faculty Minutes, without cross-reference] (on file with author). On October 12, 1957, the minutes contain the notation: "The possibility of a new building has been suggested by the university." Faculty Minutes, October 12, 1957. An article in the *Indianapolis Star* attributes to Dean Ben Small the statement that "there is a plan to organize a law curriculum for day students in the division." New I.U. Law Building Due In 1969, INDIANAPOLIS STAR, Oct. 30, 1966, § 2, at 5. The article does not indicate when the plan originated, but conversations with Ben Small at the time indicated that it was fairly longstanding. Id.
- 57. A report called Objectives and Plans of the Indianapolis Division of the School of Law, dated December 13, 1963, contained the following statement: "[T]he Committee believes that the Law School could most effectively be transformed into a new peak of excellence by consolidating both Divisions in a new building

the head of the Indianapolis Division was regarded as "The Dean" and few people considered the title to be limited by the word "associate." In fact, Dean Small succeeded in getting the Trustees of Indiana University to add the words "and Dean of the Indianapolis Law School" to his official title of "Associate Dean" in 1964.<sup>58</sup> Ben Small was dean of the Law School until the end of 1966 when he left to become the chief executive officer of the Life Insurance Association of North America.<sup>59</sup> He was succeeded by Cleon H. Foust.

#### II. AN AUTONOMOUS LAW SCHOOL WITH A NEW BUILDING

Several young faculty members were hired during the deanship of Ben Small, including this writer, Lawrence Jegen, and G. Kent Frandsen. Others, who have since moved on to distinguished careers at other law schools, include Robert Force at Tulane University, Daniel Baum at Osgoode Hall of York University, and John Slain at New York University. It was a time of great promise for the Law School. At the suggestion of Dean Cleon H. Foust, this writer prepared a report<sup>60</sup> in the spring of 1967 that demonstrated the need for a full-time division in Indianapolis. The report, using statistics from several sources, showed that when the post-World War II "baby-boomers" reached the law schools, there would be a shortage of legal education facilities in Indiana. The

at Indianapolis." This suggestion was not well received by the Bloomington faculty. A report entitled How the Academic Program of the Bloomington Division of the Law School Can Be Significantly Improved, dated December 11, 1963, contains the following statement: "These recommendations and proposals are prompted by President Stahr's invitation to the Law School to inventory its needs with a view to turning what is already a fine law school into one that can stand beside the finest in the country. Inter-divisional matters are not included because these can be better handled after each division has defined its own needs." No reference is made to the suggestion for consolidating the two divisions. While the Bloomington report is dated two days earlier than the Indianapolis report, there is every reason to believe that the Bloomington statement concerning the two division pursuing separate paths was in response to the statement contained in the Indianapolis report. Dean Wallace of Bloomington attended the meetings of the faculty of the Indianapolis Division, including the meeting of December 6, 1963, at which Professor Kelso read a draft of the December 13 report. The draft contains the statement quoted above. Both reports are attached to Faculty Minutes, December 6, 1963.

The question of consolidating the two law schools continued to be raised and was not finally settled until 1975 when a committee appointed by President Ryan to study the matter recommended against consolidation. The report has often been referred to as the Beasly Report after the chair of the committee, Eugene N. Beasley. The committee was appointed as a result of remarks made at a Board of Trustees meeting on July 10, 1975. *See* Faculty Minutes, July 11, 1975. The Beasley Report also contained the following statement: "Neither school should be viewed as the chosen instrument of legal education in Indiana. Parity in the distribution of financial resources is essential to the enrichment of our state's legal development." *Id.* 

- 58. Small Named I.U. City Unit Dean, INDIANAPOLIS STAR, December 10, 1964, § 1, at 37.
- 59. New I.U. Law Building Due In 1969, supra note 56, at 5.
- 60. See Report and Recommendations Concerning The Establishment of A Full-time Program in the Indianapolis Division of The Indiana University School of Law which may be found following Faculty Minutes, March 23, 1967. The Report is undated, but it was accepted by the faculty at the meeting held March 23, 1967, with a recommendation that it be "forwarded as a Faculty Report for comment to President Stahr." Faculty Minutes, March 23, 1967.

report was adopted by the Law School faculty with a resolution instructing the dean to forward it to President Stahr. President Stahr responded positively.<sup>61</sup> Planning began immediately, and the first full-time students were admitted to commence classes in the fall of 1969.

Not only was the Indianapolis Division given authority to begin a full-time program, it was given complete autonomy. It became the Indianapolis Law School of Indiana University.<sup>62</sup> The present name of the Law School was not settled upon until 1975, when, under the leadership of Dean William F. Harvey, who succeeded to the deanship upon the retirement of Cleon Foust in 1973, the two law schools became, by trustee action, the Indiana University School of Law—Bloomington and the Indiana University School of Law—Indianapolis.<sup>63</sup>

The planning for a new building began in the early 1960s under the leadership of a Future Plans Committee chaired by Professor R. Bruce Townsend.<sup>64</sup> The plans were completed in the fall of 1965, when the final meetings between the architects and the faculty were held.<sup>65</sup> The funding was secured by a legislative appropriation obtained in the legislative session of 1967,<sup>66</sup> with the help of the Law School's alumni under the

- 61. At a faculty meeting held on July 12, 1967, the faculty adopted a resolution that the full-time day program commence in September 1968. Faculty Minutes, July 12, 1967. The full-time program was actually commenced in September 1969.
- 62. See Faculty Minutes, April 5, 1967, where the faculty voted to adopt the name "Indiana University School of Law at Indianapolis." Despite the action of the faculty at that meeting, the faculty minutes carried the adopted name only until the meeting of February 1, 1968, at which time the heading of the minutes inexplicably changed to "Indiana University, Indianapolis Law School." That heading continued for the next few years. In the faculty minutes of August 20, 1969 the following appears: "There was some discussion of the school name and letterhead. The consensus was that the name Indiana University Indianapolis Law School should be retained . . . ." Faculty Minutes, August 20, 1969.
  - 63. Minutes of the Board of Trustees of Indiana University, September 12, 1975.
- 64. The Faculty Committees list dated October 17, 1960, which appears in the faculty minutes collection immediately after the first meeting of the school year on September 30, 1960, indicates that Professor Townsend was appointed chair of the committee. He was reappointed each year thereafter through 1965. *See* Faculty Minutes and accompanying committee appointment lists, corresponding to the first faculty meeting of each year following 1960. The minutes of the faculty meeting on April 17, 1964, contain the following statement: "Dean Small reported on law school building plans. He suggested that Professor Townsend, Chairman of the building committee, formulate space recommendations for transmission to the architects office." Faculty Minutes, April 17, 1964.
- 65. At the first faculty meeting attended by this writer, the following occurred: "Mr. Bardwell, University Architect submitted a set of revised plans for the new Law School." Faculty Minutes, September 14, 1965. This writer recalls that to be the final approval by the faculty of the plans for the current building.
- 66. The appropriation of \$3,265,607.00 was contained in Act of March 11, 1967, ch. 305, 1967 Ind. Acts 1127. A newspaper article of December 10, 1964, noted that Dr. Stahr "expressed disappointment that the budget committee of the outgoing General Assembly slashed an appropriation request of \$2,700,000.00 for the building by more than 50 percent." *Small Named I.U. City Unit Dean, supra* note 58. Dean Small reported to the faculty in April of 1965 that "2.2 million had been allocated toward the new Law School building and that the original construction estimate of \$3.48 million would have to be reduced." Faculty Minutes, April 29, 1965. The final cost of the building and furnishings was approximately \$4.5 million.

leadership of Dean Small and Professor Townsend. The specifications were drawn up by architects under the supervision of Associate Dean Lawrence Jegen and were completed by the spring of 1968, at which time Associate Dean Jegen resigned to resume full-time teaching.

In the fall of 1968, this writer became assistant dean of the Law School with the primary duties of supervising the construction and furnishing of the current building and planning the inauguration of the full-time program. Ground was broken for the new building on Saturday November 9, 1968.<sup>67</sup> It must have been an omen when, during the ground breaking ceremonies, a minor earthquake occurred. The building was completed in September of 1970, and the Law School commenced classes in it that fall.<sup>68</sup>

The Law School has occupied the current facility since 1970. The facility has served the Law School very well. However, as the program has expanded and the library has grown, the need to for more space has become obvious. Much of the library's collection has been relegated to storage as a result of its growth from about 90,000 volumes at the time this facility was completed<sup>69</sup> to about 300,000 volumes at the present time.<sup>70</sup> The growth of the faculty and the development of a clinical program have also required more space than the current structure can provide. As a result there has been a movement to either enlarge the current facility or to build a new one. Plans for an addition were abandoned when an appropriation request failed in the 1993 legislature due to a freeze on capital expenditures.<sup>71</sup> Rather than make a second effort to fund a new addition in the 1995 legislature, Dean Norman Lefstein announced in a memorandum to the faculty dated June 14, 1994, that the Trustees of Indiana University had approved a plan whereby the Law School would be allowed to build a new structure, and the current structure would be given to the Herron School of Art.

#### III. THE ALUMNI

When the Law School became a part of Indiana University in 1944, it was reported in newspaper articles that the list of alumni of the School, at that time, included three United States Senators, Frederick VanNuys (1900), Arthur R. Robinson ('10), and Samuel D. Jackson ('17).<sup>72</sup> It was also reported to include a Governor, Harry G. Leslie ('07), a

<sup>67.</sup> Ground Broken For I.U.'s \$3.8 Million Law School Building Here, INDIANAPOLIS STAR, November 10, 1968, § 1, at 19.

<sup>68.</sup> In the summer of 1969, the date for the dedication of the building was set for September 25, 1970. Faculty Minutes, July 2, 1969. This writer recalls that while the building was not entirely complete by September of 1970, the Law School moved in anyway and commenced classes. In the faculty meeting of September 1970, this writer advised the faculty of some of the peculiarities of the new building. Faculty Minutes, September 8, 1970.

<sup>69.</sup> An American Bar Association publication lists the Law School as having 93,233 volumes. LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS IN THE UNITED STATES 6 (1970).

<sup>70.</sup> The library contained 302,111 hard copy volumes in 1993. A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES 22 (1994).

<sup>71.</sup> See Faculty Minutes, September 7, 1993, in which Dean Lefstein reported on the attempt to obtain financing for the new addition.

<sup>72.</sup> Indiana Law School to Graduate 3 in Last Ceremony Before Merger, INDIANAPOLIS STAR, August

Congressman Raymond S. Springer ('04), four judges of the Indiana Supreme Court, Clarence R. Martin ('06), James P. Hughes (1900), Willard Gemmill ('02), and Howard S. Young ('03), a Seventh Circuit Court of Appeals Judge, Will M. Sparks ('99),<sup>73</sup> and three Appellate Court Judges, Frank Hamilton ('14), Dan C. Flanagan ('21) and Wilbur A. Royse ('98).<sup>74</sup>

Those newspaper articles were apparently referring to notables of recent memory and failed to mention several earlier graduates who had attained positions of prominence. For example they failed to mention Appellate Court Judge James J. Moran ('96) and Congressman Courtland Gillen, who served in the 72nd Congress from 1931 to 1933. Also not mentioned were two Supreme Court Judges, Douglas Morris ('26) and John W. Spencer ('15), and Appellate Court Judge Posey T. Kime ('37). The latter three judges served on the Supreme and Appellate Courts in an era when it was common for non-lawyers to have such positions. Supreme Court Judges Morris and Spencer obtained their degrees from this School after leaving the bench. Appellate court Judge Kime obtained his degree while still on the bench.<sup>75</sup>

In addition to the Appellate and Supreme Court Judges, the articles listed four Superior Court Judges, twenty Circuit Court Judges, two Judges of the Marion County Municipal Court, and one Judge each from the Criminal Court, Juvenile Court and Probate Court, of Marion County. The Circuit Judges included F.E. Jump of Kokomo who later endowed the Jump scholarships of the Law School.

Many alumni have achieved political prominence since the articles written at the time of the merger of the Indiana Law School with Indiana University in 1944. Two United States Senators have been added to the list. They are Dan Quayle ('74) and Dan Coats ('72), bringing the number of United States Senators graduating from this school to five. In the 73rd Congress, from 1933 to 1935, both of the U.S. Senators from Indiana had graduated from this School. In addition, Senators Fairbanks and Kern were faculty members of this School.

Other alumni who have achieved political prominence since 1944 have included Congressmen Edward H. Cruse ('42), John Richard Walsh ('34), Andrew Jacobs, Sr. ('28), Andrew Jacobs, Jr. ('58),<sup>77</sup> Phillip H. Hayes ('67), Dan Quayle ('74), and Dan

<sup>27, 1944, § 1,</sup> at 22; Merger, supra note 45.

<sup>73.</sup> No Will M. Sparks can be found among the list of graduates of the various schools. However, those lists may be incomplete. *See supra* note 32. There is an Edward M. Sparks listed in the Class of 1899, and that date is used here.

<sup>74.</sup> The newspaper articles listed Wilbur A. Rose. There is no one by that name in the rolls of the Court of Appeals. There is a Wilbur A. Royse, and it is assumed the newspaper article was referring to him. The problem does not end there, however. There is no Wilbur A. Royse listed among our graduates. There is a Walter A. Royse who graduated in 1898 and it is assumed the reference is to him.

<sup>75.</sup> Judge Kime began service on the Appellate Bench in 1931, and attended law school while on the bench. He graduated in 1937 and served on the Appellate Court until 1938. Judge William E. Steckler ('36) recalls attending classes with Judge Kime, and related to this writer that Judge Kime was a very colorful person.

<sup>76.</sup> They were Frederick Van Nuys (1900) and Arthur R. Robinson (10).

<sup>77.</sup> Andrew Jacobs, Sr., the father of Congressman Andrew Jacobs, Jr., was a member of Congress from 1948 to 1950, and he received his degree from the Benjamin Harrison Law School in 1928. Congressman Andrew Jacobs, Jr. ('58) has represented the 11th district since 1964, except for a two year haitus, 1972-1974,

Coats ('72). In addition, Edgar Whitcomb, ('50), was the Governor of Indiana from 1968 to 1972 and was also the author of a best selling book which chronicled his World War II experiences called "Escape From Corregidor." Many alumni have served in the state legislature including Paul Mannweiler ('76), who is currently the Republican leader in the Indiana Senate, and Michael Phillips ('69), who was the Democratic leader in the Indiana House of Representatives until the recent elections.

The Law School alumni have also been well represented in the Indiana Judiciary since that time. Members of the Indiana Supreme Court have included Arch Bobbitt ('27), Dixon W. Prentice ('50), Richard Givan ('51), who served as Chief Justice from 1974 to 1987, Brent E. Dickson ('68), and Jon Krahulik ('69). Until the resignation of Justice Krahulik in 1993, three of the five members of the Court were alumni of this School. Those serving on The Court of Appeals, in addition to those mentioned in the newspaper articles written at the time of the merger with Indiana University, have included Charles W. Cook ('29), John W. Pfaff ('29), George H. Prime ('30), John A. Kendall ('31), Hubert E. Wickens ('31), Joe W. Lowdermilk ('34), Warren W. Martin ('38), Stanley B. Miller ('53), Robert H. Staton<sup>78</sup> ('55), and Betty Barteau ('65). At the time of this writing a vacancy on the Court of Appeals, resulting from the death of Stanley B. Miller ('53), has just been filled by the appointment of Carr Darden ('70). All three of the finalists for that position were graduates of this Law School. They were, in addition to Carr Darden, Gerald Zore ('68), and Margaret Robb ('78).

The alumni of this Law School have been well represented on the Federal Bench by District Judges Cale J. Holder ('34), William E. Steckler ('36),<sup>79</sup> and Robert L. Miller ('75), in addition to Magistrates John P. Endsley ('56), Kennard Foster ('70), Robin D. Pierce ('76), and Bankruptcy Judges Nicholas Sufana ('40), Richard W. Vandivier ('67), and Robert L. Bayt ('72). The alumni of the School are represented on the Seventh Circuit Court of Appeals by Judge Daniel A. Manion ('73).

In addition to those serving on the Indiana Courts, one of our alumni, Gregory Scott ('77), has the distinction of being the first African-American to serve on the Colorado Supreme Court. Prior to being appointed to the Court, Mr. Scott was on the Faculty of The University of Denver College of Law.

Many of the alumni have achieved distinction in the field of legal education in addition to Gregory Scott ('77). E. Thomas Sullivan ('73) has been dean of The University of Arizona College of Law since 1989, 80 and Donald J. Polden ('75) has been the dean of Memphis State College of Law since 1993.81 Other law teachers include: Martha Traylor ('46), Seton Hall University School of Law; 82 William Traylor ('50),

when he was defeated by William Hudnut.

<sup>78.</sup> Judge Staton has been very active in alumni affairs. He currently serves on the Alumni Board and as a member of the Centennial Committee. He also produces the annual seminar on Indiana law which is held in conjunction with the annual alumni dinner.

<sup>79.</sup> Both Judge Stecker and Judge Holder received their initial degree, an L.L.B., from The Benjamin Harrison Law School and the dates shown here are the dates those degrees were awarded. Both later received a J.D. from The Indiana Law School in 1937.

<sup>80.</sup> THE DIRECTORY OF LAW TEACHERS 1993-94 at 922 (1993).

<sup>81.</sup> Id. at 767.

<sup>82.</sup> THE DIRECTORY OF LAW TEACHERS 1993-94 at 946 (1993).

Temple University School of Law;83 Herbert Meyers ('51) (deceased), Temple University School of Law;84 Earl Murphy ('52), Ohio State University College of Law;85 Ramon Klitzke ('57), Marquette University Law School; 86 M. Cherif Bassiouni ('64), DePaul University School of Law;87 G. Kent Fransden ('65) (deceased) of this Law School; Tom Collins ('69), William and Mary School of Law;88 Charles Thompson ('69) (deceased), Ohio State University College of Law, 89 Debra Falender ('75) and Susanah Mead ('76) of this Law School; Christina Kunz ('78), William Mitchell College of Law; 90 Alan Raphael ('79), Loyola University School of Law, Chicago; Catherine Mahern ('80), Creighton University College of Law;<sup>91</sup> Joan Ruhtenberg ('80), of this Law School; Richard George Wright ('82) Samford University, Cumberland Law School; Cynthia Starnes ('83), Detroit College of Law; Ellen Podgor ('87), Georgia State University College of Law; 92 Karen Jordan ('90), University of Louisville School of Law. In addition, John Vargo ('74), author of a well known, five volume, text on products liability, 93 and Jan Vargo ('85), husband and wife, taught three years at Bond University in Queensland, Australia, and have signed a contract to teach for the next five years at Deakin University in Victoria, Australia.

This list of legal educators has been compiled from the memory of a few individuals and undoubtedly does not include all those in legal education. Our apologies to those left out.

#### IV. THE LAW SCHOOL FACULTY

The founding members of the faculty and their distinctions have already been noted. Until the association with Indiana University the Faculty consisted almost entirely of practicing lawyers and judges. Nevertheless, many were distinguished scholars. William F. Elliott and Byron K. Elliott collaborated on several important works including *The Law of Roads and Streets*, which was first published by Bobbs Merrill in 1890 and went into a third edition in 1911; *Elliott on Evidence* (four volumes); <sup>94</sup> The Law of Railroads (four volumes); <sup>95</sup> The Work of The Advocate. <sup>96</sup> William F. Elliott also collaborated with Charles W. Moores to produce Indiana Criminal Law <sup>97</sup> and on his own produced

- 83. *Id*.
- 84. THE DIRECTORY OF LAW TEACHERS 1976 at 701 (1975).
- 85. THE DIRECTORY OF LAW TEACHERS 1993-94 at 709 (1993).
- 86. Id. at 571.
- 87. Id. at 191.
- 88. Id. at 299.
- 89. THE DIRECTORY OF LAW TEACHERS 1976 at 937 (1975).
- 90. THE DIRECTORY OF LAW TEACHERS 1993-94 at 585 (1993).
- 91. Id. at 641.
- 92. Id. at 767.
- 93. JOHN VARGO, PRODUCTS LIABILITY PRACTICE GUIDE (1988).
- 94. Bobbs Merrill 1905.
- 95. Bowen Merrill Co. 1893.
- 96. Bowen Merrill Co. 1888.
- 97. Bowen Merrill Co. 1893.

Commentaries on the Law of Contracts (seven volumes), and The Law of Bailments, a second edition of which was published by William Hemingway of The University of Mississippi School of Law in 1929.

William Fishback produced a book called *Manual of Elementary Law*, <sup>100</sup> which was revised by Arnold Bennett Hall in 1915, was still being used as a text in the Law School in the 1930s. W. W. Thornton produced many books and articles on Indiana law and was said by The Bench and Bar in Indiana (1916) to be the most prolific writer in the Indiana Bar. James M. Ogden, who was one of two members of the faculty of The Indiana Law School to become full time members of the faculty when that Law School affiliated with Indiana University, served for a time as Attorney General of Indiana. He authored *Negotiable Instruments*, <sup>101</sup> which was a part of the National Textbook Series, was widely used in law schools throughout the United States, and went through five editions, the last being in 1947.

The first group of faculty members hired after the Law School became a part of Indiana University included some very productive scholars, including Ben Small, R. Bruce Townsend, John S. Grimes, Lester Orfield, and Charles D. Kelso all of whom authored at least one important book.

Ben Small's Workmen's Compensation Law of Indiana: A Treatise on the Law of Employment, Accident and Disease<sup>102</sup> became the standard authority on the subject and, although it first appeared over forty years ago, it is still widely regarded as authoritative. R. Bruce Townsend led the movement to adopt the Uniform Commercial Code in Indiana and, as a part of that project, authored, with Professor Harry R. Pratter of the Bloomington Law School, The Indiana Uniform Commercial Code With Comments. <sup>103</sup> John S. Grimes wrote extensively in the real property and probate areas. He completely rewrote the multi-volumes sets, Thompson on Real Property and Henry's Probate Law and Practice, <sup>105</sup> in addition to many law review articles. Charles Kelso has been a leader in innovative legal educational methods and is the author of A Programmed Introduction To The Study of Law. <sup>106</sup> In addition he wrote The AALS Study of Part Time Legal Education. <sup>107</sup> Lester Orfield completed a seven-volume treatise on Criminal Procedure Under The Federal Rules <sup>108</sup> in addition to many law review articles. A footnote in an article in The Kentucky Law Journal attests to his productivity. It states: "Professor

- 98. Bobbs Merrill Co. 1913.
- 99. Bobbs Merrill Co. 1914.
- 100. Bowen Merrill Co. 1896.
- 101. Callaghan Co. 1909.
- 102. Bobbs Merrill 1950.
- 103. Bobbs Merrill1963.
- 104. The 14-volume set, published by Bobbs Merrill, was completely rewritten by Professor Grimes in replacement volumes, which were published from 1958 through 1985.
  - 105. The three volume Sixth Edition, by Professor Grimes, was published by Bobbs Merrill in 1954.
  - 106. Bobbs Merrill 1965.
  - 107. Assoc. of Am. Law Schools 1972.
- 108. Lawyers Coop. 1966. A new edition of the Orfield work has been published with Mark S. Rhodes as the author. MARK S. RHODES, ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES (Lawyers Coop. 1985).

Orfield's first article was published by the Kentucky Law Journal in 1929. In his letter forwarding the manuscript for the present article, Professor Orfield noted this fact then continued, 'The present article is my 101st. I thought it fitting that I start my second hundred in the same excellent journal which published my first!'" 109

#### V. THE LAW SCHOOL PROGRAM

In the early years of the Law School, the full-time program was a two year program, and credit was given for law office training completed by the student prior to entering the Law School. In 1916, the full-time program was extended to three years. Originally, the part-time program of the Benjamin Harrison Law School required a two-year commitment, and in 1931 it was extended to three years. After the consolidation of the Benjamin Harrison Law School with the Indiana Law School, the part-time program required four years to complete. The early program of the Indiana Law School was based entirely on the lecture method. In 1899, under the direction of James Rohbach, who was then Faculty Secretary, the method of instruction was changed to a textbook and case method. By 1916, the case method was the foundation for all the principal courses.

From at least 1925 until the affiliation of the Indiana Law School with Indiana University in 1944, students at Butler University were permitted to combine their senior

For some time past, the Benjamin Harrison Law School has had under consideration the extension of the curriculum to four years for all candidates for the degree. Owing, however, to circumstances over which the school has no control, a definite announcement can not be made at this time when such extension will become effective, but in no event will it apply to students enrolling during 1935-1936.

<sup>109.</sup> Lester B. Orfield, *The Complaint in Federal Criminal Procedure*, 46 Ky. L.J. 7 (1957). Reference to this footnote is made in a later article in the same journal. See Paul Oberst, *The Kentucky Law Journal—75 Years*, 78 Ky. L.J. 129, 138 (1989-90).

<sup>110.</sup> CATALOGUE, 1913-14 contained the following "Special Announcement" on page four: "The Board of Trustees have under consideration the lengthening of the course of study from two to three years to take effect after 1916. The proposed change will not affect those who enroll prior to 1916." Subsequent catalogues indicate that the change took effect as announced.

<sup>111.</sup> CATALOGUE OF BENJAMIN HARRISON LAW SCHOOL, 1929-30 contained the following anniouncement: "Beginning with the opening of the school year in September, 1931, this school will no longer offer a two year course, but will offer a course which can only be completed in three years." The predecessor schools of the Benjamin Harrison Law School had a somewhat more ambitious program. The ANNUAL ANNOUNCEMENT OF THE INDIANAPOLIS COLLEGE OF LAW, 1911-1912, describes a Master of Laws program which could be obtained in an additional year after completion of the initial two years. The YEAR BOOK OF THE AMERICAN CENTRAL LAW SCHOOL, 1911-12, indicates that a day program is offered in addition to the evening program. See supra note 32.

<sup>112.</sup> The CATALOGUE, 1936-37 shows an Evening Division Program which requires four years for completion. CATALOGUE OF THE BENJAMIN HARRISON LAW SCHOOL, 1935-36 (the last one), contained the following announcement:

<sup>113. 2</sup> COURTS AND LAWYERS OF INDIANA, supra note 1, at 482-83.

<sup>114. 2</sup> COURTS AND LAWYERS OF INDIANA, supra note 1, at 483.

undergraduate year with their first year at the Indiana Law School. As a result they could complete their undergraduate degree and law degree in a total of six years.<sup>115</sup>

In 1934, the Law School commenced a campaign to be accredited by the American Bar Association. In order to attain that rating, the Law School was required to increase the size of its library to 7000 volumes and to employ at least three full-time teachers. When the merger with the Benjamin Harrison Law School was announced in 1936, it was stated: "The merged institution will operate as a Grade A school."

After affiliation with Indiana University, the existing requirements of the Indiana University School of Law became applicable, and students were required to complete eighty credit hours. In 1969, the credit hour requirement was increased to eighty-five hours, <sup>118</sup> and in 1993 to ninety hours. <sup>119</sup>

The program, perhaps due to the Law School's background as a training school for lawyers, has always emphasized a required core curriculum. At the present time a student must complete fifty-four hours of specific required courses.<sup>120</sup> The wisdom of such a program is, perhaps, demonstrated by the fact that the graduates of the Law School have, for many years, had a higher success rate on the Indiana Bar Exam than the graduates of any other school. The success of the program has not gone unnoticed by persons outside the Law School community. In a statement published in the local press in 1970, Dr. Kenneth Penrod, the departing provost of the Medical Center noted the substantial influence that alumni of this Law School have had on Indiana's legal profession.<sup>121</sup>

The Law School, because of its location, has always afforded students the opportunity to obtain practical experience in the offices of lawyers, governmental agencies, and private organizations in downtown Indianapolis. The first effort to formalize a clinical program was described in a report by Professor Cleon H. Foust to the faculty, dated July 7, 1960. That program involved placement of students with the Legal Aid Society, with law firms, and corporate legal offices. The students could receive one and one-half hours credit for spending three and one-half hours per week at Legal Aid and a full day (or two afternoons) in law related work.

In the Faculty Minutes of July 27, 1961, reported that a new phase of legal clinic had been established in which students were assigned to work in the courts. In 1970, the faculty decided to hire a new faculty member who would primarily function as a

of Arts or Bachelor of Science in Butler University may be permitted to spend their senior year in the Indiana Law School, and the year's credits in hours and grade points will be accepted for the Arts or Science degree. This plan enables the student to complete the undergraduate and law degree in six years." After the consolidation of the Indiana Law School with the Benjamin Harrison Law School, the announcement was modified to provide that part-time students could complete the program in seven years.

<sup>116.</sup> Law School Plans Library Program, INDIANAPOLIS STAR, April 9, 1934, § 1, at 4.

<sup>117.</sup> Two Law Schools Arrange Merger, supra note 36.

<sup>118.</sup> See Faculty Minutes, October 15, 1968.

<sup>119.</sup> See Faculty Minutes, April 7, 1992.

<sup>120.</sup> See Bulletin, Indiana University School of Law—Indianapolis, 1992-1994 at 22.

<sup>121.</sup> Progress Lags on Indiana-Purdue Campus, INDIANAPOLIS STAR, Aug. 24, 1969, § 2, at 1.

<sup>122.</sup> See Faculty Minutes, July 7, 1960.

1995]

clinician.<sup>123</sup> As a result Professor Marshall Seidman was hired, and his clinical program was approved by the faculty on July 13, 1971. It outlined several internships. In 1972 Professor Seidman was assigned exclusively to the clinic in order to satisfy a grant from CLEPR.<sup>124</sup> Professor Seidman's assignment to the clinical program lasted only one year. In the years subsequent to 1972, the clinic was neglected. As a result, in 1977, the Clinical Legal Education Committee, chaired by Professor Jeffrey Grove, recommended that no credit be given for clinical programs that did not have faculty supervision. Extensive discussion of the clinical program by the faculty on August 24, 1977, <sup>125</sup> which heard from the newly appointed Clinical Placement Board and student representatives, resulted in renewed efforts to create an academically-oriented clinical program. In 1982, Professor William Marsh was assigned to the clinic on a half-time basis, and the Law School began an in-house clinic.<sup>126</sup> In 1984 Professor Mary Wolf was hired as a full-time clinician. Three full-time clinicians, Lynn McDowell, Fran Quigley, and Joanne Van Pelt, have since been added, and the clinic now provides effective clinical instruction to many students.

In 1987, under the leadership of Acting Dean Jeffrey Grove, who assumed that position when Dean Gerald Bepko became the Chancellor of Indiana University—Purdue University, Indianapolis, the Law School began the China Summer Program.<sup>127</sup> The China Program provides students from this and other law schools with a four week course in Chinese law and is conducted at the East China University of Political Science and Law in Shanghai, PRC, every summer from mid-May to mid-June. Students receive four semester hours of credit. A member of the Law School faculty accompanies the students to Shanghai and participates in the instruction which is conducted primarily by the faculty of the host institution. The course materials which have been used in the program since 1989 were assembled by this writer.<sup>128</sup> Members of this faculty who have conducted the Program are Professors William Hodes, William Marsh, Jeffrey Grove, Paul Galanti, and this writer. The permanent director of the program is Jeffrey Grove.

In 1987, under the leadership of Professor Eleanor Kinney, the Center for Law and Health was established at the Law School. The Center has three missions: (1) to conduct research on key health law issues; (2) to enhance the curriculum and teaching of health law at the Law School and the University; and (3) to serve as an information resource on health law issues for the bar and the health care community. Since its organization the influence of the Center has steadily increased. It has contracted with the Administrative Conference of the United States to analyze various aspects of the Medicare and Medicaid Programs and has done research and written reports for national as well as state governmental entities. The Center's director is Professor Eleanor Kinney.

<sup>123.</sup> See Faculty Minutes, January 19, 1970.

<sup>124.</sup> See Faculty Minutes, September 12, 1972.

<sup>125.</sup> See Faculty Minutes, August 24, 1977.

<sup>126.</sup> See Faculty Minutes, May 11, 1982.

<sup>127.</sup> The program was announced at a faculty meeting on October 14, 1986. At the faculty meeting on November 17, 1986, the faculty approved the granting of credit for those participating in the program. *See* Faculty Minutes, November 17, 1986.

<sup>128.</sup> RONALD W. POLSTON, SELECTED READINGS ON CHINESE LAW (1992). The 1994 Supplement to these course materials was prepared by professor Jeffrey W. Grove.

The size of the student body of the Law School has been the subject of faculty debate a number of times in recent years. With the establishment of the full-time program at about the same time as the construction of the present facility, the target number of students was set for 1200, and the building was said to have that capacity. However, the total number has never exceeded 950.<sup>129</sup> In 1972, the faculty, because of an apparent limitation on the availability of funds for new faculty positions and because of concern about the quality of the student body, decided to reduce the enrollment to about 800. 130 In July 1986 a task force, headed by Professor Lawrence Wilkins, studied the problem of student population and issued a report that recommended that the size of the student body be reduced to 700 students. 131 The faculty met in special session on a Saturday morning and adopted the recommendations of the task force. 132 Since that time several factors, such as an increase in applications and a resulting increase in student quality and the implementation of Responsibility Centered Budgeting at the university level has resulted in the student population remaining at about 800. Responsibility Centered Budgeting would result in loss of funds to the Law School if the size of the student body were reduced. The question of size of the student body occupies the attention of the faculty every year. For the past several years the faculty have decided to admit a beginning class of about 255 to 260 students.

#### VI. LAW SCHOOL PUBLICATIONS

The *Indiana Law Journal*, a privately owned publication, began in 1895 at about the same time as the Indiana Law School. Its editor was the dean of the Law School, William Fishback. It was in the era before the student-operated law reviews of today, and it contained news of the legal profession in Indiana along with short articles on legal subjects. That publication appears to have existed for only three years. The Indiana State Bar Association began a publication by the same name in 1925, and, in 1926, gave editorial control of it to the Indiana University School of Law in Bloomington. While it continued to carry news of the Indiana Bar Association and to report the proceedings of the annual meetings of the Association, the editorial content was controlled by faculty and student boards of the Law School in Bloomington. The Bar Association continued to be the publisher for several years, during which time it reported the affairs of the Bar Association. Eventually it was turned over entirely to Indiana University and became the student operated law review of the Law School in Bloomington.

- 129. TASK FORCE ON STUDENT POPULATION, FINAL REPORT 6 (1986).
- 130. See Faculty Minutes, February 1, 1972.
- 131. TASK FORCE ON STUDENT POPULATION, supra note 129, at 11.
- 132. See Faculty Minutes, November 15, 1986.
- 133. Only a few copies of the publication are in the Law School library, the first being Volume I, No. 6 dated June 1898. It was published by the Indiana Law Journal Co. William Fishback is listed as the editor, and three other members of the faculty of the Indiana Law School, William F. Elliot, Charles W. Moores and W. P. Kappes, are listed as associate editors.
  - 134. 1 IND. L.J. (1925).
  - 135. 2 IND. L.J. (1926).

After the affiliation of this Law School with Indiana University in 1945, students of the Indianapolis Division were given the opportunity to participate on the Editorial Board of the Indiana Law Journal, but there was friction between the divisions, which made it very difficult for students of the Indianapolis Division to get their work published. In 1964, Indianapolis Division student John Stark recommended to the Indianapolis faculty that the Indianapolis Division be given one or two issues of the Indiana Law Journal to publish as its own. 136 At a joint meeting of the faculties of the two divisions in December of 1964, the president of Indiana University approved an appropriation to enable the students at Indianapolis to publish an issue of the Indiana Law Journal containing an annual survey of Indiana law. 137 In March of 1965, Indianapolis student Steve Devoe outlined, in a memorandum to the faculty, a plan for a fifth issue of the *Indiana Law* Journal to be issued around October 1 of each year. <sup>138</sup> In the fall of 1965, Dean Small of the Indianapolis Division confirmed that the money had been made available for the Indiana Law Journal project. 139 In August 1966, Professor Force stated at a faculty meeting that the survey issue of the Indiana Law Journal would go to the printer the following September. 140 However, objections by the Bloomington Division resulted in that issue never appearing as a part of the *Indiana Law Journal*. Instead it became, <sup>141</sup> in the fall of 1967, the first issue of the *Indiana Legal Forum*, <sup>142</sup> a law review published entirely by the Indianapolis Division. It operated under that name until it was changed. by faculty action in March 1972, 143 to the *Indiana Law Review*.

The annual survey of Indiana law, for which funds were made available by President Stahr in 1964, did not become a reality until 1973 when the *Indiana Law Review* began an annual issue, which contains a survey of Indiana law. The survey has been very successful and influential in the development of Indiana law.

In 1991, a second law review, the *Indiana International and Comparative Law Review*, was commenced by the students of the Law School under the leadership of student James R. Meyer, Jr. It too has been very well received by the Law School and the legal community.

<sup>136.</sup> See Faculty Minutes May 5, 1964.

<sup>137.</sup> See Faculty Minutes, December 9, 1964.

<sup>138.</sup> See Faculty Minutes, March 29, 1965.

<sup>139.</sup> See Faculty Minutes, October 15, 1965.

<sup>140.</sup> See Faculty Minutes, August 23, 1966.

<sup>141.</sup> Professor Robert Force, now at Tulane University School of Law, was shown as the faculty adviser of the publication. In a recent telephone conversation, he stated that he does not recall many of the details surrounding that intitial issue but that the first issue he worked on contained a symposium on criminal law. The initial issue of the *Indiana Legal Forum* contains a survey of criminal law and is obviously the issue that Professor Force referred to in his report to the faculty in August 1966.

<sup>142. 1</sup> IND. LEGAL F. (1967).

<sup>143.</sup> See Faculty Minutes, March 21, 1972.

<sup>144. 7</sup> IND. L. REV. (1973).

#### VII. THE ADMINISTRATION OF THE LAW SCHOOL

The first dean of the Indiana Law School was William Fishback, <sup>145</sup> and the first dean of the Benjamin Harrison Law School was Theophilus J. Moll. <sup>146</sup> In the early years, the two schools also had a president or a chancellor. The respective original holders of that office were Byron K. Elliot <sup>147</sup> and W.W. Thornton. <sup>148</sup> After the death of William Fishback, James A. Rohbach became the dean of the Indiana Law School and held that office until 1933. Mr. Rohbach is remembered as being the life and soul of the Indiana Law School until his retirement in 1931. <sup>149</sup> For a time thereafter, the Indiana Law School was administered by an Executive Committee <sup>150</sup> until the merger with Benjamin Harrison Law School, at which time Joseph G.Wood assumed the deanship of the day division, and William R. Forney became dean of the evening division. <sup>151</sup> W.W. Thornton was the long time dean of the Benjamin Harrison Law School, serving until 1932. <sup>152</sup> At that time William R. Forney became acting dean and held that office until the merger of the two schools in 1936. <sup>153</sup> When the Law School became part of Indiana University the officers were: James Ogden, President, Addison Dowling, dean of the day division, and William R. Forney, dean of the evening division. <sup>154</sup>

After the affiliation with Indiana University, the chief executive officer of the Law School was an associate dean. That office was first held by Henry Witham.<sup>155</sup> Dean Witham retired in 1960 and was succeeded by Ben Small.<sup>156</sup> The accomplishment of Dean Small's administration included the laying of ambitious plans that resulted in the school gaining autonomy, a new building, and a resumed full-time program. When Dean Small left the Law School in 1966, he became the chief executive officer of the Life Insurance Association of North America.<sup>157</sup> Cleon H. Foust succeeded him as dean.<sup>158</sup>

- 145. See CATALOGUE, 1894-95.
- 146. See YEARBOOK OF THE BENJAMIN HARRISON LAW SCHOOL, 1915-16.
- 147. Supra note 37.
- 148. Supra note 38.
- 149. Letter from William J. Wood to William F. Harvey (Sept. 24, 1993) (on file with author). The letter stated: "I cannot overemphasize the importance of Dean James A. Rohbach. All evidence is that he was the heart and soul of the Indiana Law School and kept it going through thick and thin." William J. Wood is the son of Joseph Wood who was later the dean of the Law School.
  - 150. See CATALOGUE, 1932-33.
- 151. CATALOGUE, 1935-36 still shows only an Executive Committee. CATALOGUE, 1936-37 (after the merger) shows William J. Wood as dean of the day division and William R. Forney as dean of the evening division.
- 152. CATALOGUE OF THE BENJAMIN HARRISON LAW SCHOOL, 1931-32 shows W.W. Thornton to be the dean, and the CATALOGUE OF THE BENJAMIN HARRISON LAW SCHOOL for the next year shows William R. Forney to be the acting dean.
  - 153. CATALOGUE OF THE BENJAMIN HARRISON LAW SCHOOL, 1932-33.
- 154. See Composite Photo for Class of 1944, the last class to graduate from the Indiana Law School (available at the Indiana University School of Law—Indianapolis).
  - 155. See supra note 46 and accompanying text.
  - 156. Small Named I.U. Law Dean, INDIANAPOLIS TIMES, August 12, 1960.
  - 157. See source cited in supra note 59.

Dean Foust, under whose administration autonomy was achieved, the new building constructed, and a full-time program commenced, served until his retirement and return to teaching in 1973. It was also during his administration that the faculty, at the request of the university administration, adopted a constitution for the Law School. The constitution is still in effect.

William F. Harvey became the dean of the Law School in 1973. Dean Harvey worked hard to obtain a parity of funding with the Law School in Bloomington and succeeded in getting the Board of Trustees to adopt an official policy to that effect.<sup>159</sup> It was also during his administration that the library of the Law School became the largest in Indiana,<sup>160</sup> and the present name of the Law School was adopted.<sup>161</sup> When Dean Harvey returned to teaching in 1979, he was succeeded by Frank T. Read. At a Faculty retreat held during Dean Read's administration, the Faculty adopted extensive amendments to the Faculty Constitution concerning Law School governance and the curriculum.<sup>162</sup>

Frank T. Read left the Law School in 1981 to become dean of the Law School of the University of Florida. He later became dean of Hastings College of Law of the University of California. He is currently back at the Law School teaching a course and serving as assistant to James P. White, the Consultant on Legal Education to The American Bar Association. Gerald Bepko, who served as an associate dean in the administration of Dean Read, succeeded him. Dean Bepko left the deanship in 1986 to become Vice President of Indiana University and Chancellor of Indiana University—Purdue University, Indianapolis. Upon his departure Jeffrey W. Grove became the acting dean until the selection of Norman Lefstein as dean. Dean Lefstein is the current dean of the Law School. He is making efforts with the current university administration to obtain a new building for the Law School.

#### CONCLUSION

The Law School, from its beginning until the present, has been a university-affiliated full-time institution, except for the period from 1945 to 1969 when it functioned as the part-time division of the Indiana University School of Law. Even during that period,

<sup>158.</sup> See Faculty Minutes, January 6, 1967, in which the faculty recommended that Cleon H. Foust be named acting dean. See also subsequent Faculty Minutes in which he appears as dean.

<sup>159.</sup> See Memorandum from Dean Harvey to the Faculty dated September 15, 1975 (reporting on the action of the Board of Trustees at its meeting of September 12, 1975). Faculty Minutes, January 15, 1976, attachment.

<sup>160.</sup> See LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS (1972). The library of the Law School was second to that of the School of Law in Bloomington. Id. The same publication for 1975 indicates that the library of this Law School is larger than that of the School of Law in Bloomington. LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS (1976).

<sup>161.</sup> See supra note 151.

<sup>162.</sup> In 1979, Dean Read announced the appointment and mission of task forces on governance and academic standards. *See* Faculty Minutes, August 27, 1979. The reports of those task forces were considered later that year at a faculty retreat held November 9 and 10, 1979.

however, it never really lost its identity as a separate institution, and, at the first opportunity, it resumed a full-time program and its autonomy within Indiana University.

Through its faculty and alumni the School has played an important role in providing Indiana, and the nation, with practicing lawyers, political leaders, judges, and policy makers. At the national level it has produced three vice presidential candidates, seven United States Senators and many members of Congress. At the state level it has produced many leaders in Indiana Government, including governors, and, in fact, has more of its graduates in the Indiana judiciary than any other law school.

Although proud of its past the School looks forward to the next century as the time when it will make its most important mark in the Bench and Bar of the state and nation and will become an even bigger force in the field of legal education in the United States.

# A SHORT HISTORY OF HEARSAY REFORM, WITH PARTICULAR REFERENCE TO HOFFMAN V. PALMER, EDDIE MORGAN AND JERRY FRANK

#### MICHAEL ARIENS\*

"Few historians, however, hold themselves out as fictionists."

Jerome Frank, The Place of the Expert in a Democratic Society<sup>1</sup>

True, no man can be wholly apart from his fellows. But, if each of us is a promontory, yet the promontory reaches out beyond the social mainland to a point where others cannot intrude. . . . It is a no-other-man's land, for others can't penetrate it, can't communicate with it.

Jerome Frank, Judge Learned Hand<sup>2</sup>

#### Introduction

On my summer vacation, I chanced upon the novel *Foe* by the South African writer J.M. Coetzee.<sup>3</sup> *Foe* is a modern reworking of Daniel Defoe's *Robinson Crusoe*. In this modern retelling, Coetzee presents the story of the relation of author and subject, not the story of the adventures of a shipwrecked Englishman. In *Foe*, the authorial voice is that of Susan Barton, a castaway who ended up on the same island as Cruso and Friday. She, Cruso and Friday are "rescued" and taken by ship to England. En route, Cruso dies. Once in London, Susan Barton takes her story of Cruso and Friday to Daniel Foe, and finds that his interest is more in the story of her life and less in the story of Cruso's adventures. Foe, chased by creditors, flees his house, into which Barton and Friday move. Barton later leaves, searching for Foe, whom she finally tracks down. Confronting Foe, she says, "I am not a story, Mr. Foe." Then, after embracing a young woman who also calls herself Susan Barton and claims to be her daughter, a claim denied by our narrator, she continues:

In the beginning I thought I would tell you the story of the island and, being done with that, return to my former life. But now all my life grows to be story and there is nothing of my own left to me. I thought I was myself and this girl a creature from another order speaking words you made up for her. But now I am full of doubt. Nothing is left to me but doubt. I am doubt itself. Who is speaking me? Am I a phantom too? To what order do I belong? And you: who are you?<sup>5</sup>

<sup>\*</sup> Professor, St. Mary's University School of Law, San Antonio, Texas. Permission to quote from the Edmund M. Morgan Papers at the Harvard Law School Library was kindly given by Harvard Law School Archivist David de Lorenzo, whose assistance on this and other projects is here gratefully acknowledged.

<sup>1.</sup> Jerome Frank, *The Place of the Expert in a Democratic Society*, reprinted in A MAN'S REACH: THE PHILOSOPHY OF JUDGE JEROME FRANK 31 (Barbara Frank Kristein ed., 1965).

<sup>2.</sup> Jerome Frank, Judge Learned Hand, reprinted in A MAN'S REACH: THE PHILOSOPHY OF JUDGE JEROME FRANK 49 (Barbara Frank Kristein ed., 1965).

<sup>3.</sup> J.M. COETZEE, FOE (1987).

<sup>4.</sup> Id. at 131.

<sup>5.</sup> Id. at 133.

My story is about the history of hearsay (and, more broadly, evidentiary) reform. My story more particularly is about a case involving two major figures in American law. For evidence scholars, the case of *Palmer v. Hoffman*<sup>6</sup> represents one of a few cases concerning hearsay known by name.<sup>7</sup> The two major figures are Jerome N. Frank and Edmund M. Morgan, Jr., whose stories I have both appropriated, and, I hope, treated with honor and respect.

Jerome Frank remains well known in legal academia as a symbol of American legal realism during the interwar years. His 1930 book, *Law and the Modern Mind*, became one of the foremost works of legal realism. Frank's work and influence in American law and legal thought has been the subject of several books, and his influence on American legal thought is a prominent feature of recent works on the history of American law. In contrast, although Morgan was an important figure in the history of legal reform and the professionalization of legal education, he is remembered today only by evidence and procedure scholars. Even here, his influence has been undervalued.

- 6. 318 U.S. 109 (1943), aff'g Hoffman v. Palmer, 129 F.2d 976 (2d Cir. 1942). Because the plaintiff Hoffman was successful in the Second Circuit, the defendant Palmer, a trustee of the railroad, was the petitioner before the Supreme Court and thus the first named party. My interest, however, is in the Second Circuit decision, not the decision of the Supreme Court.
- 7. Others include the English case of Wright v. Doe d. Tatham, 7 Ad. & E. 313, 112 Eng. Rep. 488 (1837) (defining hearsay in broad terms, thus extending the reach of the rule); Shepard v. United States, 290 U.S. 96 (1933) (holding inadmissible as a dying declaration a statement by defendant's deceased wife shortly before she died that "Dr. Shepard has poisoned me."); Donnelly v. United States, 228 U.S. 243 (1913) (holding inadmissible to prove defendant's innocence to murder charge a confession by another, deceased at the time of trial); and Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892) (holding admissible as exception to hearsay rule letter written by Adolph Walters concerning his future travel plans with plaintiff's allegedly deceased husband to show Walters, and not plaintiff's husband, was the decedent).
- 8. JEROME FRANK, LAW AND THE MODERN MIND (1930). This book went through 6 printings by 1948, and in 1985 was reprinted in the Legal Classics series.
- 9. Julius Paul, The Legal Realism of Jerome N. Frank (1959); J. Mitchell Rosenberg, Jerome Frank: Jurist and Philosopher (1970); Walter E. Volkomer, The Passionate Liberal: The Political and Legal Ideas of Jerome Frank (1970); Robert Jerome Glennon, The Iconoclast as Reformer: Jerome Frank's Impact on American Law (1985). Interestingly, none of these works is a biography. Although the milestones of Frank's life are briefly noted, it is Frank's work that is analyzed, not his life. This is somewhat surprising given Frank's view of the importance of understanding a judge's personality in order to understand the legal process. A collection of Frank's writings is A Man's Reach: The Philosophy of Judge Jerome Frank (Barbara Frank Kristein ed., 1965). A bibliography of articles about and memorial tributes to Jerome Frank is found in Marvin Schick, Learned Hand's Court 362-63 (1970). See also J. Mitchell Rosenberg, Frank, Jerome, in Dictionary of American Biography 1956-60, at 215 (John A. Garraty ed., Supp. VI 1980).
- 10. BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 482-91 (1993); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870-1960 at 175-79 (1992). See generally KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 270-71 (1989); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 688, 692 (2d ed. 1985). See also Neil Duxbury, Jerome Frank and the Legacy of Realism, 18 J.L. & Soc'y 175 (1991).
  - 11. One example of the fact that Morgan is undeservedly forgotten is the absence of an entry on Morgan

The issue in the case of *Hoffman v. Palmer* was relatively simple: In a case involving a collision between a car and a train, was the defendant railroad permitted to introduce into evidence the transcript of a question and answer session made two days after the accident between the engineer of the train and another employee of the railroad? If believed, this statement exonerated the railroad from liability. Although a federal statute<sup>13</sup> enacted in 1936 appeared to permit (and maybe even require) the trial court to admit the statement, the court excluded the statement. On appeal, writing for a divided court, Judge Jerome Frank held that the statute implicitly required the absence of a motive to lie on the part of the declarant (the railroad engineer who gave the statement) in order for the statement to be admissible. His opinion was unanimously affirmed by the Supreme Court in an opinion written by Justice William O. Douglas.<sup>14</sup> Morgan vehemently disagreed with both Frank and Douglas's opinions. *Hoffman v. Palmer* is emblematic of the history of the American law of evidence, of law reform, and, because of the people involved, of the history of twentieth century American legal thought.

#### I. THE IDEA OF HEARSAY REFORM

Much of the history of the American law of evidence, including its most contentious (and difficult) issue, hearsay, is the story of stasis and reform. In 1810, the first compiler of the American law of evidence, Zephaniah Swift, wrote:

For a long time, the rules of evidence were uncertain, and contradictory, and in some instances, were not adapted to the discovery of truth. But, by a course of modern decisions, founded on the most liberal principles of policy, they are reduced to a precision, and certainty, susceptible of little further improvement,

in the Dictionary of American Biography. A second example is the absence of Morgan's name from any of the four books cited in supra note 10.

12. I have written a history of the codification of the American law of evidence in which Morgan plays a central role. Michael Ariens, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence*, 17 LAW & SOC INQ. 213 (1992). Although I am indebted to his excellent work, I am convinced that a prominent historian of evidence, William Twining, has marginalized Morgan's role in his study of the "Anglo-American" history of evidence. *See generally* WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE (1985).

#### 13. 28 U.S.C. § 695 (1936):

Admissibility. In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.

14. 318 U.S. 109 (1943).

and may now be considered as placed on a basis, that will endure as long as truth and justice shall be revered.<sup>15</sup>

Thirty years later, Harvard Law School Professor Simon Greenleaf<sup>16</sup> published the first volume of his three-volume *Treatise on the Law of Evidence*. At the close of this volume, Greenleaf wrote:

The student will not fail to observe the symmetry and beauty of this branch of the law, under whatever disadvantages it may labor from the manner of treatment; and will rise from the study of its principles, convinced, with Lord Erskine, that "they are founded in the charities of religion—in the philosophy of nature—in the truths of history—and in the experience of common life." 17

Of this first major American evidence treatise, Charles Sumner wrote, "[Greenleaf's] aim has been to expound the law as it is, and not to enter into the entangled discussion of the various questions of its reform." One area in which "the law as it is" was not to be disturbed was hearsay. In Greenleaf's view, "considerations of public interest and convenience" "are considerations of too grave a character to be overlooked by the court or the legislature" to change the rule. Possibly because this work attempted merely to "expound the law as it is," Greenleaf's *Treatise* was enormously successful, going through sixteen editions, the last published in 1899 under the partial editorship of John Henry Wigmore.

The most prominent proponent of evidentiary reform during the antebellum era was John Appleton,<sup>20</sup> later a Supreme Court justice in the state of Maine. Appleton's essays, most of which were written in the 1830s, roundly criticized the rules of evidence for hampering the search for the truth. When Appleton's articles were collected and printed in book form in 1860,<sup>21</sup> he claimed in the *Preface* that rules of evidence designed to protect themselves by "knaves and criminals great and small" could not "have materially improved upon the existent law."<sup>22</sup> Among the rules of greatest concern to Appleton were

<sup>15.</sup> ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE, IN CIVIL AND CRIMINAL CASES x (1810 Arno repr. 1972).

<sup>16.</sup> On Greenleaf, see H.W. Howard Knott, *Greenleaf, Simon, in* 7 DICTIONARY OF AMERICAN BIOGRAPHY 583 (Allen Johnson & Dumas Malone eds., 1931); Charles Warren, 1 HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 480-543 (1908); 2 *id.* at 1-46; THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917 at 215-19 (1918). Professor Alfred Konefsky is writing a biography of Greenleaf.

<sup>17.</sup> SIMON GREENLEAF, 1 A TREATISE ON THE LAW OF EVIDENCE § 584 (1842) (footnote omitted).

<sup>18.</sup> Charles Sumner, Greenleaf on Evidence, 27 Am. JURIST & L. MAG. 379, 388 (July 1842).

<sup>19.</sup> GREENLEAF, supra note 17, at § 124.

<sup>20.</sup> On Appleton, see DAVID M. GOLD, THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM (1990), a study of Appleton's work. A fond personal reminiscence by Charles Hamlin is found in *John Appleton*, 5 Great American Lawyers 41 (William Draper Lewis ed., 1908). See also Robert Hale, Appleton, John, in 1 DICTIONARY OF AMERICAN BIOGRAPHY 328 (Allen Johnson ed., 1928).

<sup>21.</sup> JOHN APPLETON, THE RULES OF EVIDENCE STATED AND DISCUSSED (1860).

<sup>22.</sup> Id. at 9-10.

the rules excluding as incompetent witnesses interested parties and atheists.<sup>23</sup> Also of concern were the rules protecting privileged communications.<sup>24</sup> Appleton later turned to the rules regulating hearsay.<sup>25</sup> In an article titled *Hearsay Evidence*, Appleton made a case for the admission of hearsay evidence if the declarant was dead.<sup>26</sup> Although hearsay is "an inferior species of evidence," "when the witness is dead, his declarations in whatsoever form attainable should be received." After Appleton's essays were reprinted in book form, two of the handful of reviews, while praising the work, deemed some of Appleton's proposed reforms "radical." Proposed reforms "radical."

Both Appleton and defenders of the rules of evidence in nineteenth century America believed the goal of the rules was to produce the truth. At his retirement dinner in 1883, Appleton stated his view of the role of the judge:

He should seek for the truth. He should present facts as they exist. . . . [H]e would be derelict of his duty if he omitted to clearly state to them the evidence and its bearings on the rights of parties—thus aiding the jury in arriving at the truth. One side of every litigation is in the right and the other in the wrong.<sup>29</sup>

Whether one accepted or disparaged the current state of the law of evidence, the rules of evidence were based on the premise that the trier of fact (usually a jury) was to hear evidence which allowed it to determine what really happened.

In 1898, Harvard Law School Professor James Bradley Thayer's book, A Preliminary Treatise on the Law of Evidence, was published. In his Treatise, Thayer preached that because of the manner in which the rules of evidence were created and developed, "there has resulted plenty of confusion." The "greatest obstacle to be overcome" in the

- 23. John Appleton, Incompetency of Parties as Witnesses at Common Law, 8 Am. JURIST & L. MAG. 5 (July 1832); John Appleton, Incompetency of Witnesses from Interest, 6 Am. JURIST & L. MAG. 18 (July 1831); John Appleton, Incompetency of Witnesses from Infamy of Character, 5 Am. JURIST & L. MAG. 101 (Jan. 1831); John Appleton, Of Incompetency of Witnesses on account of Religious Opinion, 4 Am. JURIST & L. MAG. 286 (Oct. 1830).
- 24. John Appleton, Attorney and Client, 17 Am. JURIST & L. MAG. 304 (July 1837); John Appleton, The Admission of Husband and Wife, 15 Am. JURIST & L. MAG. 274 (July 1836).
- 25. John Appleton, Hearsay Evidence and Confessions or Admissions of the Party, 20 Am. JURIST & L. MAG. 68 (Oct. 1838); John Appleton, Hearsay Evidence, 24 Am. JURIST & L. MAG. 118 (Oct. 1840) [hereinafter "Hearsay Evidence"].
  - 26. Hearsay Evidence, supra note 25.
  - 27. Hearsay Evidence, supra note 25, at 120-21.
- 28. Review of Current Literature, 70 CHRISTIAN EXAM. 150, 151-52 (Jan. 1861) ("Judge Appleton rests his argument on the very startling and radical proposition—which the reader will find assumed on every page—that the object of evidence is to get at facts . . . ."); 24 MONTHLY L. RPTR. 450 (May 1862) ("While there are now, probably, few persons who would assent to all of his conclusions—some of which are, in a legal sense, extremely radical . . . .").
  - 29. Hamlin, supra note 20, at 77 (quoting retirement speech of Chief Justice John Appleton).
- 30. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON THE LAW OF EVIDENCE 4 (1898). On Thayer, see Samuel Williston, *Thayer, James Bradley, in* 18 DICTIONARY OF AMERICAN BIOGRAPHY 405 (Dumas Malone ed., 1936); James Parker Hall, *James Bradley Thayer, in* 8 GREAT AMERICAN LAWYERS 343 (William Draper Lewis ed., 1909); *James Bradley Thayer*, 15 HARV. L. REV. 599 (1902). *See also* Jay Hook,

reform of the law of evidence were lawyers. However, by emulating the statutory reform of civil procedure in Massachusetts, legislative reform of the law of evidence was possible.<sup>32</sup> If the law of evidence were to be reformed, the result should be that "[w]e should have a system of evidence simple, aiming straight at the substance of justice, not nice or refined in its details, not too rigid, easily grasped and easily applied."<sup>33</sup>

Thayer briefly considered the problem of hearsay in the final chapter of the *Treatise*. For Thayer, "[a] true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible." In 1898, the Massachusetts legislature, at Thayer's behest, passed an act barring hearsay objections to declarations made by a "deceased person" "if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant."

Then, in 1904-05, Thayer's former student and friend, John Henry Wigmore, published his four-volume *Treatise on Evidence*.<sup>36</sup> Wigmore's work was one of conservative reform. "That our law of Evidence can be improved upon, no one doubts. That the improvement must be gradual, yet unremitting, is equally certain . . . ."<sup>37</sup> Like

A Brief Life of James Bradley Thayer, 88 Nw. U. L. REV. 1 (1993). Hook is currently working on a biography of Thayer.

- 31. THAYER, supra note 30, at 532.
- 32. THAYER, *supra* note 30, at 532-533. Thayer approvingly judged this reform as "a careful but radical change." THAYER, *supra* note 30, at 533.
  - 33. THAYER, *supra* note 30, at 529.
  - 34. THAYER, supra note 30, at 522.
  - 35. 1898 Mass. Acts ch. 535:

No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it apears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant.

This act was later amended to read:

A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.

MASS. GEN. L. ch. 233, § 65 (Mass Ter. ed. 1932).

John Appleton suggested a similar revision of the rule against hearsay in his 1840 article. See Hearsay Evidence, supra note 25, at 120-21.

- 36. JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (4 vols. 1904-05) [hereinafter Treatise I]. On Wigmore, see WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER (1977); Stephen Botein, *Wigmore, John Henry, in Dictionary of American Biography* 1941-45 at 820 (Edward T. James ed., Supp. III 1973); *John Henry Wigmore*, 38 Ill. L. Rev. 1 (1943); *John Henry Wigmore: A Centennial Tribute*, 58 Nw. U. L. Rev. 443 (1963).
- 37. 1 TREATISE, supra note 36 at xii. See also JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW at § 8c (2d ed. 1923) [hereinafter TREATISE II]. ("Our system of evidence is sound on the whole."). Wigmore seemed pained by the accusation that "the rules of Evidence, over and above all others have come to bear, even within the profession itself, the stigma of technical arbitrariness and obstructive unreason." TREATISE I, supra note 36, at vii-viii. For Wigmore, this was not true: "The rules of Evidence, as recorded in our law, may be said to be essentially rational." TREATISE I, supra note 36, at viii.

Appleton's earlier effort for evidentiary reform, Wigmore's *Treatise* focused on the relation between the rules of evidence and the search for the truth. "What the law of Evidence, and of Procedure, nowadays most needs is that the men who are our judges and our lawyers shall firmly dispose themselves to get at the truth and the merits of the case before them."

18 Unlike Appleton, Wigmore noted that this relation was hampered by the professional inclination to appeal evidentiary issues rulings on evidence. "The partisan spirit of the bar, contesting desperately on each trifle, and the unjust doctrine of new trials, tempting counsel to push up to the appellate courts upon every ruling of evidence, increased this tendency."

19 By 1908, however, Wigmore had concluded that only the opinion rule, which barred witnesses other than experts from testifying to "opinions" instead of "facts," was "radically discreditable."

For evidence progressives like Thayer and Wigmore, the prospect of reform faced several hurdles. Although the era of the great court lawyer as symbol of the lawyer as professional was coming to a close by the beginning of the twentieth century, the era's ethos of the sporting theory of justice predominated.<sup>41</sup> Progressives also believed reform efforts were blocked by incompetent and often corrupt state legislatures and local trial judges.

Until his death in 1943, Wigmore was the brooding omnipresence of the law of evidence. Any effort to reform the law of evidence needed to pass Wigmore's muster if it were to have any chance of judicial or legislative acceptance. Even with his blessing, prospects for reforming the law of evidence were severely limited by professional inertia and complacence.

The first major effort to reform the law of evidence began in 1920. A Legal Research Committee sponsored by the Commonwealth Fund appointed a Committee to Propose Specific Reforms in the Law of Evidence. The chairman of the Evidence Committee was Edmund M. Morgan, then a professor at Yale Law School. The report was finally published in 1927, and did not propose a model code of evidence, because, according to the Committee, "[o]ur system of evidence is sound on the whole." Instead, the

- 38. WIGMORE, CODE OF EVIDENCE at xiii (2d ed. 1935).
- 39. 1 TREATISE I, supra note 36, at § 8. Wigmore was echoing a comment made by Thayer in his Treatise: "In our own administration of the law of evidence too many abuses are allowed, and the power of the courts is far too little exercised in controlling the eager lawyer in his endeavors to press to an extreme the application of the rules." The result was that the American judicial process tended "thus to foster delay and chicane." THAYER, supra note 30 at 528-29. Two years after Wigmore's book was published, Roscoe Pound, then Dean at the University of Nebraska Law School, excoriated the profession at the annual meeting of the American Bar Association for its attachment to the "sporting theory of justice." Roscoe Pound, The Causes of Popular Dissatisfaction in the Administration of Justice, 29 A.B.A. REP. 395, 405 (1906), and cited Wigmore for the proposition that this view inaccurately depicted the adversary system. The next year Wigmore hired Pound to teach at Northwestern. He also returned the favor, approvingly citing Pound's speech as "diagnosing" the causes of the defects of American procedural law, including the law of evidence. WIGMORE, SUPP. TO TREATISE vii (1908).
  - 40. WIGMORE, SUPP. TO TREATISE vi.
- 41. I have discussed this change in the professional elite in Michael Ariens, Know the Law: A History of Legal Specialization, 45 S.C. L. REV. 1103 (1994). See also supra note 39.
  - 42. EDMUND M. MORGAN, ET AL., THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM xii n.1

Committee's report contained five specific proposals, including two proposals to admit statements otherwise excluded by the rule barring hearsay evidence. The first permitted the introduction of a hearsay statement if made by a person who died before the trial. This reform proposal was based on a Massachusetts law enacted in 1898.<sup>43</sup> The second was a proposal to liberalize the admission of business records, otherwise classified as hearsay statements.<sup>44</sup>

This latter proposal was enacted the next year in New York.<sup>45</sup> In 1930, in *Johnson* v. Lutz,<sup>46</sup> the New York Court of Appeals concluded that a police report of an accident, which included statements made to the officer by bystanders, who may not have had personal knowledge of the accident, was not within the operation of the Act because those bystanders were under no duty to make any statement to the officer. On June 20, 1936, based on a four-page report from the Senate Judiciary Committee<sup>47</sup> and without any recorded debate, Congress passed the Commonwealth Fund Evidence Committee's proposal concerning business records.<sup>48</sup>

Two additional evidentiary reform efforts were undertaken in the 1930s. The first was an effort led by Wigmore under the auspices of the American Bar Association.<sup>49</sup> Among the twenty specific proposals made by the ABA Committee on Improvements in the Law of Evidence was a proposal to amend the common law rule concerning the admissibility of business records as an exception to the hearsay rule.<sup>50</sup> Additionally, the Committee recommended adoption of the "Massachusetts" rule permitting the introduction of hearsay statements made by persons who had died by the time of the trial, as long as the statements were made in good faith before the controversy arose.<sup>51</sup> However, the Committee noted "a probable lack of united professional support for any radical, or even any substantial changes."<sup>52</sup>

(1927). This language constituted Wigmore's opinion, and was actually taken from a statement of his in his *Treatise*. See TREATISE II, supra note 37, at § 8c.

- 43. MORGAN, supra note 42, at 37-49.
- 44. MORGAN, supra note 42, at 51-63.
- 45. 1928 N.Y. Laws, ch. 532. This law was codified as § 374-a of the Civil Practice Code of New York.
  - 46. 170 N.E. 517 (N.Y. 1930).
- 47. SENATE JUDICIARY COMMITTEE REPORT, ADMISSIBILITY IN EVIDENCE OF CERTAIN WRITINGS AND RECORDS, 74th Cong., 2d Sess., Rep. No. 1965, April 24, 1936 [hereinafter COMMITTEE REPORT].
  - 48. 28 U.S.C. § 695.
- 49. Report of the Committee on Improvements in the Law of Evidence, 63 A.B.A. REP. 570 (1938) [hereinafter Report].
- 50. *Id.* at 582-83. This was the second of twenty proposals offered. The Committee preferred the adoption of the Uniform Laws Conference Draft of 1936, because it was an "improvement" of the language used in the Commonwealth Fund reform proposal, but recommended both proposals, as well as a a third proposal by a Northwestern University Law School student, Roscoe L. Barrow, in a 1937 article. *See* Roscoe L. Barrow, Comment, *Business Entries Before the Court*, 32 ILL. L. REV. 334 (1937).
  - 51. Report, supra note 49, at 584-85.
  - 52. Report, supra note 49, at 570.

The second and most thorough effort to reform the law of evidence was the American Law Institute's Model Code of Evidence.<sup>53</sup> The Institute's reporter was Morgan, whose reputation in the field of evidence was second only to Wigmore's. Unlike Wigmore, Morgan was not content to draft a code embracing incremental reform. In the first of four articles published in the American Bar Association Journal concerning the Model Code of Evidence, Morgan declared, "It is time, too, for the radical reformation of the law of evidence."54 Much of the radical reformation of the law of evidence consisted in giving greater discretion to trial judges to admit or exclude evidence. In Morgan's view, however, the most "radical" provision concerned reform of hearsay.55 The Code specifically proposed the adoption of a broad hearsay exception for business records<sup>56</sup> and an exception admitting hearsay statements made by persons no longer alive at the time of trial.<sup>57</sup> At the same time the American Law Institute formally approved the Model Code of Evidence,58 Judge Jerome Frank was authoring an opinion that would assist in halting the efforts to promote evidentiary reform.

#### II. THE ORIGINS OF HOFFMAN V. PALMER

On Christmas Day, 1940, at about 3:15 p.m., newlyweds<sup>59</sup> Howard Hoffman, a twenty-four-year old graduate of Rensselaer Polytechnic Institute (RPI) and recently employed construction engineer, and his twenty-three-year old wife Inez T. Spraker Hoffman, a Vassar graduate, began their trip back home to Hartford, Connecticut from the home of Inez's parents in Cooperstown, New York. On Route 41 in West Stockbridge, Massachusetts, at about 6:10 p.m., on a "dark, pitch black" yet "clear" night, a Ford coupe, driven by Howard, collided with a train of the New York, New Haven, and

- 53. MODEL CODE OF EVIDENCE (1942).
- Edmund M. Morgan, Jr., The Code of Evidence Proposed by the American Law Institute, 27 A.B.A. J. 539, 540 (Sept. 1941). This was the first of four consecutively published articles with the same title. See also Edmund M. Morgan, Foreward to MODEL CODE OF EVIDENCE 6 (1942).
- See Morgan, Code of Evidence, supra note 54, at 595 ("Consequently it is in the chapter on Hearsay that the code departs most widely from the common law."); Charles T. McCormick, The New Code of Evidence of the American Law Institute, 20 Tex. L. Rev. 661, 671 (1942) ("The draftsman [Morgan] describes Rule 503 as the most radical departure from the common law in the whole Code.") (footnote omitted).
  - MODEL CODE OF EVIDENCE Rule 514. 56.
  - 57. MODEL CODE OF EVIDENCE Rule 503(a).
  - 58. 19 A.L.I. PROC. 74, 257 (1942).
- According to the complaint, the Hoffmans were married on August 10, 1940. Hoffman v. Palmer, Record at 12; Complaint at 9 [hereinafter Record] (on file with author). This, along with the following statements of Howard Hoffman's testimony and the testimony of the other witnesses, is taken from the record filed in Hoffman v. Palmer, United States Court of Appeals for the Second Circuit and from the Brief for Plaintiff-Appellee and Brief for Appellants (on file with author). The original record of the case is retained at the National Archives-Northeast Region, and a printed Transcript of Record to the Supreme Court (Palmer v. Hoffman, No. 300, October Term 1942) is also available on microfiche.
- Brief for Plaintiff-Appellee at 3; Record, supra note 59, at 49 (testimony of Howard Hoffman that it was "pitch black" at the time of the accident).
  - Record, supra note 59, at 215 (testimony of Norma Mary Gennari); Brief for Appellants at 4.

Hartford Railroad Company. Inez died, and Howard was "severely and permanently"62 injured.

Howard Hoffman filed suit in the United States District Court for the Eastern District of New York, claiming residence in "the Borough of Brooklyn, County of Kings, City and State of New York." The railroad was incorporated in Connecticut, and maintained its principal office in New Haven, which created diversity of citizenship between the parties. Because the railroad was bankrupt and undergoing reorganization in federal district court in Connecticut, Hoffman obtained permission to file suit against Howard S. Palmer, Henry B. Sawyer and James Lee Loomis, all trustees of the Railroad. Hoffman alleged on his own behalf and as administrator for the estate of his wife that the railroad violated its statutory duty of care under Massachusetts law as well as its common law duty of care.

Hoffman testified that he came to a stop fifteen to twenty feet from the Elkey-Buckley railroad crossing, looked both ways, and saw no light and heard no bell. He then started up in first gear, travelling between three and five miles per hour as he approached the grade crossing. As he was just about over the near rail, he saw a dark mass closely approaching from his left. He still saw no light. The next thing he knew, he was a patient at the Pittsfield, Massachusetts hospital.<sup>67</sup> To prove that no light was at the head of the train and that no warning sound by bell or whistle was made, Hoffman's counsel called several other witnesses. A car driven by Laurence Bona and including as passengers his wife Lillian and his siblings Arthur and Edna was on Route 41 travelling the opposite direction from the Hoffmans. Because they had seen "a" train go by three-fourths of a mile southeast of the crossing where the accident took place, the Bonas all testified that they knew a train might be coming. They heard no bells or whistles as they approached the crossing. Arthur heard a crash and Laurence was the first person to reach the Hoffmans after the accident. The other witness for the plaintiff, Norma Gennari, testified

<sup>62.</sup> According to the complaint, his injuries included "a compound comminuted fracture of the right leg[,]... comminuted fracture of the left femur," several lacerations on his head and face, a concussion and a two inch puncture of the right femur. Record, *supra* note 59, at 6; Complaint at 3. In testimony, Hoffman stated that he remained in the hospital from the time of the accident until the end of May 1942, a six month period. Record, *supra* note 59, at 56-58.

<sup>63.</sup> Record, *supra* note 59, at 4; Complaint at 4. At the trial, Hoffman stated that he was temporarily residing in Troy, New York, taking graduate engineering classes at RPI, but continued to claim permanent residence in Brooklyn. Records at the Alumni Office at RPI indicate that Hoffman never received a master's degree. Hoffman died on May 18, 1982.

<sup>64.</sup> Record, *supra* note 59, at 19; Answer at 1. If Hoffman had continued to maintain his residence in Hartford, as it was before the accident, the case could not have been filed in federal court.

<sup>65.</sup> For simplicity's sake, I will refer to defendants as "the railroad."

<sup>66.</sup> That civil cases are resolved much more slowly today than in the past is indicated by the speed with which this case was concluded. Suit was filed on July 17, 1941, and final judgment was rendered on November 25, 1941. The opinion of the United States Court of Appeals for the Second Circuit was released on June 23, 1942 (an amended opinion was released on July 31, 1942), and the Supreme Court decided the case on February 1, 1943. If you're counting, that means that the entire case, from filing to judgment by the Supreme Court, took just slightly more than 18 months.

<sup>67.</sup> Record, *supra* note 59, at 49-55.

that as she walked home that evening, about 600 feet from the site of the accident, she heard no whistle or bell, but did hear the crash.

The train, consisting of an engine with a tender and a caboose, was backing up. The caboose was attached to the nose of the engine. Thus, the tender of the engine was the "front" of the train, and was the first part of the train to cross the Elkey-Buckley intersection.

The Railroad claimed its agents acted with due care and asserted that Hoffman was contributorily negligent. To prove a whistle blew and a bell sounded, the defense offered the testimony of the conductor, a brakeman and flagman riding in the caboose, the sister and brother of the conductor, and five other witnesses. 68 The defense also offered the testimony of Harry Meach, the fireman, who testified he saw the Hoffman's car approach the crossing, slow down about eighteen to twenty feet from the crossing, and then speed up as the head of the tender arrived at the crossing.<sup>69</sup> Meach did not see the tender hit the car, turning his head "so that I couldn't see what happened when we got by. I didn't care to witness it, in other words." Additionally, Norma Gennari testified that the coupe was travelling between thirty and thirty-five miles per hour when it disappeared from her view. The defendant noted that the point at which the coupe would have disappeared from Norma Gennari's view was between twenty and seventy feet from the railroad track.<sup>71</sup> The Railroad also offered testimony regarding inconsistent statements made by the Bonas and Norma Gennari that cast doubt on whether they had not heard a whistle or bell, 72 as well as a statement by Laurence Bona in which he described his encounter with Hoffman in the hospital after the accident. Bona claimed that "[Hoffman] said he stopped for the crossing and what he saw was the back of the train. He thought the train was gone by and he started up and it hit him and that is all he could remember. He was in tough shape."<sup>73</sup> At trial, Bona denied making this statement.<sup>74</sup>

The Railroad argued that Hoffman had mistakenly believed the "front" of the train, that is, the tender, was actually the "end" of the train. The mistake led him to think the train had crossed the intersection when it had actually just entered the intersection. The jury evidently disagreed with the Railroad's theory of the case, finding for the plaintiff in both his individual and administrative capacities.<sup>75</sup> On November 25, 1941, an order was entered granting judgment to Howard Hoffman in the amount of \$25,077.35 and to him

<sup>68.</sup> See generally Record, supra note 59, at 263-421. Two of those witnesses, the engineer's widow Bertha McDermott, and her son's friend, Francis James Hoerman, testified more about the engineer's actions before coming upon the Elkey-Buckley intersection than what happened as the train approached the intersection. A sixth defense witness, fifteen-year old Amenio Selva, testified that he saw a light but heard no whistle from his vantage point about 1500 feet from the crossing. Record, supra note 59, at 396-400.

<sup>69.</sup> See Record, supra note 59, at 329-53.

<sup>70.</sup> Record, supra note 59, at 339.

<sup>71.</sup> Brief for Appellants, supra note 59, at 7.

<sup>72.</sup> Record, supra note 59, at 373-80; 409-10.

<sup>73.</sup> Record, supra note 59, at 376 (testimony of stenographer Henry R. Hunt).

<sup>74.</sup> Record, supra note 59, at 116-17.

<sup>75.</sup> Record, *supra* note 59, at 441.

as the Administrator of the estate of Inez in the amount of \$9000.76 The Railroad appealed.

On appeal, the Railroad listed four errors. One claimed error was placing the burden of proof of contributory negligence on the defendant. The other three claimed errors were evidentiary. In order, the claimed errors included: (1) the refusal of the trial court to permit the testimony, on direct examination, of the observations of a defense witness concerning the line of sight at the Elkey-Buckley crossing; (2) the exclusion of an interview of the engineer of the train, Harold McDermott, who died before the trial, by J.W. Cuineen, Assistant Superintendent of the Railroad, which occurred in the presence of E.J. Conley of the Legal Department of the Railroad, W.E. Christie of the Massachusetts Public Utilities Commission and S. Byrne, lieutenant of railroad police; and (3) the court's ruling permitting the plaintiff to introduce in evidence a written statement given by Laurence Bona to Hoffman's lawyer if defense counsel requested to see the statement.

The Railroad's brief consisted of twenty-one printed pages, of which thirteen were dedicated to the four claims of error. On the issue that made this case famous, the exclusion of the engineer's statement, the Railroad used less than two pages to make its argument.<sup>79</sup> While acknowledging the finality of the jury's verdict on disputed issues of fact, the attention given to the facts by the appellant was apparently designed to highlight the claimed error concerning burden of proof on the issue of contributory negligence.<sup>80</sup>

<sup>76.</sup> As evidence that the award in favor of Howard Hoffman was a substantial verdict for the era, note that seven years after the verdict, in 1948, in the first volume of the NACCA Law Journal, a publication of the National Association of Claimants' Compensation Attorneys, included was a section titled "Verdicts or Awards exceeding \$50,000." See 1 NACCA L.J. 99 (1948). After detailing several verdicts, the two page section concluded with, "NACCA is interested in reporting large verdicts or compensation awards because of their manifest interest to members of the bar. Please report those in excess of \$50,000..." Id. at 100. Under Massachusetts wrongful death law, see MASS. GEN. L. ch. 229 § 3 (Ter. ed. 1932), the measure of damages was "not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of culpability" of the Railroad, so the award to the estate of Inez Hoffman was nearly the maximum allowed by law.

<sup>77.</sup> In the Brief for Plaintiff-Appellee, Cuineen's name is spelled "Cuneen." Brief for Plaintiff-Appellee, supra note 59, at 9.

<sup>78.</sup> After Cuineen finished questioning McDermott, Christie asked three questions of the engineer. *See infra* note 117.

<sup>79.</sup> The "argument" consisted of a quotation of the statute, an indented citation to three Second Circuit cases interpreting the statute, and a conclusory statement that, "A reading of engineer McDermott's statement shows its relevancy and materiality on all the issues of negligence submitted to the jury-headlight, whistle, and bell." Brief for Appellants, *supra* note 59, at 14.

<sup>80.</sup> At the close of its discussion of the facts, the brief for appellant concluded, "Naturally the trial court said it could not substitute its opinion for the opinion of the jury. Burden of proof as to contributory negligence became a very practical consideration. We shall discuss other aspects of the evidence under the appropriate law points." Brief for Appellants, *supra* note 59, at 7. Hoffman claimed that the Railroad violated both Massachusetts statutory law as well as the common law. The possibly differing bases of these claims raised problems under the rule in the then recently decided case of Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938). The emphasis on the issue of burden of proof was in part a consequence of the Supreme Court's decision in Klaxon

In response, the plaintiff's brief was largely occupied with the issue of the burden of proof of contributory negligence. More than eight pages of this twenty page brief were dedicated to that issue, and less than one-and-a-half pages discussed the exclusion of the business records.<sup>81</sup> Appellant's reply brief discussed only the issue of the allocation of the burden of proof of the issue of contributory negligence.<sup>82</sup>

The reply brief for the appellant railroad was filed with the Second Circuit clerk on May 11, 1942.<sup>83</sup> The court's decision was first released on June 23, 1942. An amended opinion dated July 31, 1942 was published in the West Federal Reporter.<sup>84</sup>

#### III. THE CAST OF CHARACTERS

The case of *Hoffman v. Palmer* was heard before a panel consisting of Thomas W. Swan, <sup>85</sup> Charles E. Clark, <sup>86</sup> and Jerome N. Frank. Both Swan and Clark had formerly held the position of Dean at Yale Law School. Swan was Dean from 1916 through 1926, when he was appointed to the court. Swan was conservative in an age that equated liberal with progressive, had married into wealth, yet was considered "a first-rate professional" whose work as Dean had made Yale Law School a better and more progressive school. Swan remained on the bench until the late 1950s, and was noted for his work in commercial law. <sup>88</sup>

Swan appointed Clark to the Yale Law School faculty in 1919. Ten years later, Clark was appointed Dean, after the whirlwind deanship of Robert M. Hutchins, and remained Dean until 1939, when he was made a judge of the Second Circuit. Clark is best known for his reform work as Reporter to the Advisory Committee on the Federal Rules of Civil Procedure. His affection of the rules of procedure resulted in Learned Hand

- v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), decided less than six months before the trial in Hoffman v. Palmer, which interpreted *Erie* to require federal courts in diversity cases to apply the conflict of laws rule of the state in which they sit.
- 81. Brief for Plaintiff-Appellee, *supra* note 59. The discussion of the exclusion of the business record began at page 9 and concluded approximately a quarter down the next page. The burden of proof issue began at page 12 of the brief and concluded at page 20. The first five-and-one-half pages of the Brief were devoted to a recitation of the pleadings and facts.
  - 82. Reply Brief for Appellants, supra note 59. The reply brief was six pages in length.
  - 83. See Reply Brief for Appellants, supra note 59, at first page (date-stamp of receipt of brief).
  - 84. Hoffman v. Palmer, 129 F.2d 976 (2d Cir. 1942).
- 85. On Swan, see Learned Hand, *Thomas Walter Swan*, 57 YALE L. J. 167 (1947); Eugene V. Rostow, *Thomas W. Swan*, 1877-1975, 85 YALE L.J. 159 (1975); Arthur L. Corbin, *The Yale Law School and Tom Swan*, YALE L. REP., Spring 1958, at 2; SCHICK, *supra* note 9, at 19-23.
- 86. On Clark, see JUDGE CHARLES EDWARD CLARK (Peninah Petruck ed. 1991); Eugene V. Rostow, Judge Charles E. Clark, 73 YALE L.J. 1 (1963). A bibliography of articles about Clark is found in SCHICK, supra note 9, at 361. See generally LAURA KALMAN, LEGAL REALISM AT YALE, 1927-60, at 115-40 (1986). As is the case with Morgan, there is no entry on Clark in the Dictionary of American Biography.
- 87. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 282 (1994) (noting comment made to Hand by Ned Burling).
  - 88. John P. Frank, The Top Commercial Court, FORTUNE, Jan. 1951, at 92.
  - 89. On the history of the Federal Rules of Civil Procedure, see Stephen N. Subrin, How Equity

frequently, and sarcastically, referring to him as "The GLAPP," or "The Greatest Living Authority on Practice and Procedure." Unlike Swan, Clark was a long-time political liberal and progressive reformer.

Frank, who assumed office on May 5, 1941, was the author of *Law and the Modern Mind* and a controversial New Dealer.<sup>92</sup> He was educated at the University of Chicago and practiced law in that city for many years before moving to New York to practice on Wall Street. He was an indefatigable reader, curious about almost everything, and a prolific writer of a number of books and law review articles. Although he was considered brilliant by colleagues and acquaintances and found by nearly everyone to be "warm and personable," Frank was sensitive to criticism, and apparently "unable to concede a point to an intellectual opponent."

In contrast to the stellar abilities and accomplishments of the members of the panel hearing the appeal, the lawyers for the parties were nondescript. Hoffman's counsel of record, Benjamin Diamond, was a 1930 graduate of the law school at St. Lawrence University in Canton, New York, and a sole practitioner in Brooklyn. The trial and appellate arguments were conducted, however, by William Paul Allen. Allen, born in 1883, was a member of the firm of Fearey, Allen and Johnston until 1942, when he and

Conquered Common Law: The Federal Rules in Historical Perspective, 135 U. PA. L. REV. 909 (1987); Peter Charles Hoffer, Text, Translation, Context, Conversation: Preliminary Notes for Decoding the Deliberations of the Advisory Committee that Wrote the Federal Rules of Civil Procedure, 37 Am. J. LEG. HIST. 409 (1993). See also Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. PA. L. REV. 1015 (1982).

- 90. Professor Gunther, Learned Hand's biographer, calls it Clark's "passion." GUNTHER, *supra* note 87, at 522.
- 91. GUNTHER, *supra* note 87, at 300, 522. Gunther notes that Hand sent a ditty to his colleague Harrie Chase about Clark's devotion to the "wules," as Clark apparently pronounced them.

Dare we construe any wule sans Charles? I submit the following verses:

There once was a fellow named Clark

Who thought it a Hell of a lark

To discuss about wules,

And then call us fools,

Because we were so in the dark.

GUNTHER, supra note 87, at 522 (quoting Letter from Learned Hand to Harrie Chase (April 24, 1940)). Clark's impression on Hand must have been strong, for when this letter was sent, Clark had been a member of the court only slightly more than a year.

- 92. On Frank's firing from the Agriculture Adjustment Administration, see PETER N. IRONS, THE NEW DEAL LAWYERS 173-80 (1982); GLENNON, *supra* note 9, at 98-101.
- 93. GLENNON, *supra* note 9, at 24 (including in the group the philosopher Morris Cohen, with whom Frank engaged in lengthy intellectual disagreement in the early 1930s).
- 94. GLENNON, supra note 9, at 24. See also GUNTHER, supra note 87, at 527 ("[W]hile [Frank] himself was quite sensitive to perceived slights, he was uninhibited in inflicting wounds on his adversaries.").
  - 95. GLENNON, supra note 9, at 23.
- 96. By the time the case reached the Supreme Court, William Paul Allen was listed as the counsel of Howard Hoffman, and Diamond was listed as "of counsel." *See* Brief for Respondent, Palmer v. Hoffman, No. 300, October Term 1942 (on file with author).
  - 97. 1 MARTINDALE-HUBBELL LAW DIRECTORY 1137 (72d ed. 1940).

Eugene P. Fitzpatrick formed the firm of Allen and Fitzpatrick. On appeal to the Second Circuit, Diamond and Allen were joined by Edward H. Wilson and Milton Dombroff. Wilson, sixty-six years old, was a graduate of New York Law School, and Dombroff was a 1931 graduate of St. John's University Law School. Both men were sole practitioners, and Allen, Wilson and Dombroff all practiced law at 70 Pine Street in New York City. Counsel for the Railroad throughout this litigation was Edward R. Brumley, whose brief listing in Martindale-Hubbell noted only his location at Grand Central Terminal. Only Wilson, who received an "a v" rating, was rated by Martindale-Hubbell. Presiding at the trial was Matthew Abruzzo, the least respected federal district judge within the Second Circuit.

Finally, there is Morgan, <sup>103</sup> known to friends and acquaintances as Eddie. Morgan was a short, thin, quite handsome man, and, as a longtime member of the American Law Institute, professor at Harvard Law School (1925-50) and editorial director of the University Casebook series of Foundation Press, a prominent member of the legal establishment. Morgan was also stubborn and argumentative, traits he traced to his Welsh heritage, a heritage of which he was quite proud. In mid-1942, at the age of sixty-three, with the departure of James Landis to Washington, Morgan was appointed Acting Dean of Harvard Law School, a position he would hold for the remainder of World War II. After the third call from his alma mater, Morgan became a member of the Harvard Law

- 98. See id. at 1068 (listing in Biographical Section firm of Fearey, Allen and Johnston); 1 MARTINDALE-HUBBELL LAW DIRECTORY 1137 (74th ed. 1942) (listing in Biographical Section firm of Allen and Fitzpatrick). The Brief for Plaintiff-Appellee in the Second Circuit, supra note 59, makes no mention of either "firm," and these organizations may have been office arrangements more than partnerships. Allen also argued the case before the United States Supreme Court. Palmer v. Hoffman, 318 U.S. 109, 110 (1943).
  - 99. The Brief for Respondent filed in the Supreme Court lists only Allen and Diamond.
- 100. All this information is taken from the 72d edition of the Martindale-Hubbell Law Directory. Neither Wilson nor Dombroff placed a listing in the Directory's Biographical Section. Instead, each was simply given a one-line summary. *See* 1 MARTINDALE-HUBBELL LAW DIRECTORY 1355, 1446 (72d ed. 1940).
- 101. This listing is the same for the years 1938-42. See id. at 1342. Listed as of counsel to the trustees for the Railroad in the petition for certiorari were B.J. Seifert and A.G. Kuhbach, and in the petition for rehearing A.G. Kuhbach and R.W. Rickard. As Frank noted in his opinion, Brumley represented the Railroad in previous litigation. See Hoffman v. Palmer, 129 F.2d 976, 998 (2nd Cir. 1941).
- 102. SCHICK, *supra* note 9, at 137-38 ("While Learned Hand was chief judge none of the several dozen district judges within the Second Circuit was as lowly regarded or criticized so often in print by the appellate court as was Abruzzo."). One district judge who came close, however, was Judge Robert A. Inch, also a district judge in the Eastern District of New York, disparagingly called "Judge Millimeter" by Hand. *See* GUNTHER, *supra* note 87, at 302.
- 103. In addition to the cast of characters noted above, I could include Justice William O. Douglas, who wrote the opinion for the Supreme Court unanimously affirming the decision of the Second Circuit. Douglas was a friend of Frank's from the earliest days of the New Deal. See William O. Douglas, Foreword to A MAN'S REACH: THE PHILOSOPHY OF JUDGE JEROME FRANK, supra note 1, at xvii. Clark was Dean when William O. Douglas was hired as a professor at Yale. He also was Dean when Jerome Frank received an appointment in 1934 as research associate at Yale, although this appointment apparently meant little, for Frank did not spend any time in New Haven then. Frank began teaching at Yale as an adjunct professor after World War II, and thus well after Clark had left Yale for the Second Circuit.

School faculty in 1925.<sup>104</sup> Before Harvard, Morgan taught at the University of Minnesota and Yale, respectively. Morgan knew Swan<sup>105</sup> and Clark quite well from his years at Yale. After five years at the University of Minnesota, Morgan was hired by Dean Tom Swan to begin teaching at Yale in the fall of 1917, although he did not arrive until 1919, after two years in Washington in the Judge Advocate Corps. During the six years Morgan taught at Yale, he was a colleague of both Charles E. Clark, who also joined the Yale law faculty in 1919, and Tom Swan, who was Dean throughout Morgan's years at Yale. In addition to Evidence, Morgan taught Civil Procedure and Practice Court at Yale. Clark also taught Civil Procedure.

In 1935, Clark was named Reporter for the Advisory Committee on the Federal Rules of Civil Procedure. One of the most influential members of the Committee was Morgan, the author of a casebook on Pleading. In 1939, Morgan was appointed Reporter of the American Law Institute's (ALI) Committee on the Model Code of Evidence. In an attempt to avoid an initial attack on the Committee's competence, as well as to prevent interference with its work, the unchallenged authority on the American law of evidence, John Henry Wigmore, was named Chief Consultant. Morgan and Wigmore's wary relationship dated back over twenty years, to their work at the Judge Advocate Corps in Washington during World War I. 107 In 1940, when Wigmore attacked the structure of the proposed Model Code, claiming it was not specific enough, it was Clark who suggested

<sup>104.</sup> See Corbin, supra note 85, at 25.

<sup>105.</sup> Swan graduated from Harvard Law School in 1903, and Morgan graduated from there in 1905. I do not know whether they knew each other as students.

<sup>106.</sup> In a letter dated December 6, 1938 to William Draper Lewis, Executive Director of the ALI, Morgan wrote asking "whether any group drafting a code of Evidence can be formed without including Wigmore. To include him would doubtless extend the time required to get the job done. To exclude him would, I should suppose, require an explanation which it would be rather embarrassing to make." Letter from Edmund M. Morgan to William Draper Lewis (December 6, 1938) (Edmund M. Morgan Papers, Harvard Law School Library, Box 1, Folder 2) [hereinafter Morgan Papers]. The decision to give the seventy-five-year old Wigmore the title of Chief Consultant (along with a salary of \$100 per month) but exclude him from the Committee was intended to both placate Wigmore and allow Morgan to draft a code as he desired.

<sup>107.</sup> In early 1919, a dispute over the fairness of the system of military justice erupted. A military general in the judge advocate corps and Acting Judge Advocate General, Gen. Samuel T. Ansell, promoted reform. His superior, Judge Advocate General Enoch H. Crowder, rejected Ansell's call for reform and demoted him to his prewar rank of Lieutenant Colonel. Supporting players chose sides: Morgan, a major, publicly supported Ansell, and Wigmore, promoted to colonel during the War, supported Crowder. In June, 1919, Morgan and Wigmore engaged in public debate before the Maryland State Bar Association about the system of military justice. See Address by Col. John H. Wigmore before the Maryland State Bar Association (June 28, 1919), in 24 MD. St. B. Trans. 183 (1919); Address by Col. Edmund M. Morgan before the Maryland State Bar Association (June 28, 1919), in 24 MD. St. B. Trans. 197 (1919). I plan to write about this event in greater detail, for I believe it offers some insight into the relatively chilly relationship between Wigmore and Morgan and may help to explain their differences of opinion concerning specific rules and the general structure of the rules of evidence. On the Crowder-Ansell debate, compare Terry W. Brown, The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell, 35 MIL. L. REV. 1 (1967) (concluding Ansell's position was right) with Frederick Bernays Wiener, The Seamy Side of the World War I Court-Martial Controversy, 123 MIL. L. REV. 109 (1989) (blaming Ansell for the dispute).

the proposed draft was *too* specific. As Morgan later put it, the choice was "between a catalogue, a creed, and a Code. The Institute decided in favor of a code." 108

In the 1930s, Morgan and Frank began a fitful exchange of correspondence. It started after Frank's article, *Why Not a Clinical Lawyer-School?*, was published. Morgan, whose work developing "Practice Court" at both the University of Minnesota and Yale was something of which he was very proud, wrote Frank a letter criticizing some of Frank's proposals. Frank replied in defense of his proposal, Morgan responded defending his criticism, and the pattern of future exchanges was set. 110

On May 26, 1942, Frank wrote Morgan,

#### Dear Eddie:

We have a question of evidence which might interest you. The issue is the admissibility of a report made to his employer by a railroad engineer following a collision between his train and an automobile. I'm especially interested to know whether, if such reports were customarily made after accidents, you would call them entries made in the regular course of business, and whether you have considered the problem in your various capacities as Commonwealth Fund Expert, A.L.I. Restater, etc.<sup>111</sup>

Morgan replied, "The inquiry in your letter of May 26 seems to me to admit of an easy answer. I should classify the reports made in the regular course of duty by the

<sup>108.</sup> Edmund M. Morgan, Foreward to MODEL CODE OF EVIDENCE 13 (1942). The story of the Model Code of Evidence is detailed in Ariens, Progress Is Our Only Product, supra note 12, at 229-37. Clark declined an invitation to serve as a consultant to the Model Code Committee due to his "real concern over the product." His concern was that the code was too particularized, the "great bane of the law of evidence today" and something which was "against the modern trend." Letter from Charles Clark to William Draper Lewis (February 23, 1940) (Morgan Papers, supra note 106, at Box 2, Folder 2). Clark would later air his disagreement with the drafters of the Code at the Annual Meeting of the ALI in May 1940. See 17 A.L.I. PROC. 66, 80-84 (1940).

<sup>109.</sup> Jerome N. Frank, Why Not a Clinical Lawyer-School?, 81 U. PA. L. REV. 907 (1933).

<sup>110.</sup> See Letter from Morgan to Frank (July 5, 1933); Letter from Frank to Morgan (July 11, 1933); Letter from Morgan to Frank (August 11, 1933). All correspondence between Frank and Morgan is found in the Jerome N. Frank Papers, Sterling Memorial Library, Yale University, Box 14, Folder 166 (1933, 1935 correspondence), Box 61, Folder 631 (1941-45, 1947-48, 1952 correspondence) [hereinafter Frank Papers], and Edmund M. Morgan Papers, supra note 106, at Box 5, Folders 4, 8, 9, 10, and Box 6, Folder 1. Frank's sensitivity to criticism is well displayed in his July 11, 1933 letter to Morgan. Frank claimed that Morgan, in reviewing a book titled A Judge Takes the Stand, had implicitly attacked Frank and had accused him of being "some kind of brash publicity seeker" and of writing Law and the Modern Mind "in a lurid fashion in order to make it sell." Letter from Jerome Frank to Edmund M. Morgan (July 11, 1938) (Frank Papers, supra, at Box 14, Folder 166; Morgan Papers, supra note 106, at Box 5, Folder 4). Morgan denied making such charges and claimed, "Indeed, I have a strong suspicion that the differences in our views would settle down to differences in emphasis." Letter from Edmund M. Morgan to Jerome Frank (August 11, 1933) (Frank Papers, supra, at Box 14, Folder 166: Morgan Papers, supra note 106, at Box 5, Folder 4).

<sup>111.</sup> Letter from Jerome N. Frank to Edmund M. Morgan (May 26, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 8).

engineer as statements or entries made in the regular course of business."112 Later in the same letter, Morgan wrote,

The case which you suggest is clearly distinguishable from *Johnson v. Lutz*, 253 N.Y. 124, for there was no duty on the by-standers to report to the policemen, and I take it that in your case there was a duty on the engineer to make the investigation and report what he found . . . . <sup>113</sup>

Frank responded ten days later by writing, "As to my views—well, I'd better say nothing until our opinion is published."<sup>114</sup>

#### IV. HOFFMAN V. PALMER

## A. The Opinion

Frank's opinion is masterful. For a lawyer who spent nearly all of his career as a private lawyer in corporate reorganization work and most of his career in public service creating the administrative state, his use of sources is amazingly broad. He was given little help by the parties' briefs, no help at all by the trial court's decision, 115 and still managed to write an opinion covering nearly twenty pages of the Federal Reports in approximately a month's time. Although a judge for just slightly over a year, the opinion is crafted in Frank's peculiar style; it is an essay of an autodidact about both law and the human condition, captured in the framework of an opinion.

Frank's opinion affirmed the judgment in favor of the plaintiff Hoffman. On the issue the lawyers believed most important, the issue of the burden of proof concerning contributory negligence, the panel unanimously (and quite briefly) agreed that the trial

- 112. Letter from Edmund M. Morgan to Jerome N. Frank (May 29, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 8).
- 113. Letter from Edmund M. Morgan to Jerome N. Frank (May 29, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 8).
- 114. Letter from Jerome N. Frank to Edmund M. Morgan (June 8, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 9). Frank then continued his letter by asking Morgan a number of questions concerning the ALI's Model Code of Evidence, whose Reporter was Morgan.
- 115. The record in the case indicates the following colloquy concerning the admissibility of the engineer's statement:

Mr. Brumley: The defendants offer in evidence the statement of the engineer, who the proof indicates is now dead, a statement taken in the regular course of business, the defendant claims, after the accident happened.

The statement was signed by the engineer, and is marked for identification as Exhibit J, under Section 695 USCA 28.

The defendants offer the proof also that this statement was signed in the regular course of any business, and that it was the regular course of such business to make such statement.

Mr. Allen: I object to the statement.

The Court: Mr. Allen objects to the introduction of this statement in evidence, and the Court sustains the objection and grants an exception to the defendant.

Record, supra note 59, at 421.

court had properly assigned the burden of proof to the railroad.<sup>116</sup> Although only perfunctory attention was paid the issue of the admissibility of the engineer's report<sup>117</sup> by

- 116. Hoffman v. Palmer, 129 F.2d 976, 998, 1002 (2d Cir. 1942). In the Supreme Court, the issue was not dismissed quite so summarily. Although the trial court may have correctly placed the burden of proving contributory negligence on the defendant concerning the Massachusetts statutory claim, the court probably erred in placing this burden on the defendant regarding the common law claim. However, because the defendant did not differentiate between the statutory and common law claims in his request for an instruction placing the burden concerning contributory negligence on the plaintiff, the defendant's general exception to the court's decision to place the burden on the defendant was not specific enough to "obtain a new trial." Palmer v. Hoffman, 318 U.S. 109, 116-20 (1943).
  - 117. The "statement" of the engineer, Harold D. McDermott, is as follows:
  - Q. [by Mr. J.W. Cuineen, Assistant Superintendent of the Railroad]: How long employed by the New Haven Railroad?
  - A. 33 years.
  - Q. In what capacity? A. Fireman and Engineer.
  - Q. How long an Engineer? A. 22 years.
  - Q. You are qualified on the characteristics of the Railroad between Pittsfield, Great Barrington, and State Line? A. Yes, Sir.
  - Q. You were engineer on engine 438 with Conductor Johnson on December 25th? A. Yes, Sir.
  - Q. What time did you leave Daly's? A. 5:45 P.M.
  - Q. What did you have? A. Engine and caboose.
  - Q. You were headed south? A. Backing up.
  - Q. You had a back-up headlight on the tender? A. Yes, sir, a good one.
  - Q. Where did you light it? A. Daly's.
  - Q. Where was the caboose? A. On the nose of the engine.
  - O. Then the tender of the engine was the first vehicle out? A. Yes, sir.
  - Q. How many cars did you have leaving Pittsfield? A. I really don't know.
  - Q. Did you use your air brakes between Pittsfield and Daly's? A. I don't remember.
  - Q. Had you used your air brake before the accident? A. No.
  - Q. When you coupled onto the caboose at Daly's did you test your air? A. No.
  - Q. Why not? A. Just didn't, cut the air in and doubled the pressure.
  - Q. Did you make a running test? A. No, sir.
  - Q. Aproaching Weststockbridge, the first highway crossing north of the station what whistle signals were given for that crossing? A. Regulation crossing whistle two long two short repeated.
  - Q. Where? A. Whistling post and repeated to finish just as the engine hit the crossing.
  - Q. You have an automatic bell ringer? A. Yes.
  - Q. When did you start it? A. It was gong all the way from the whistling post at the first crossing until after the accident happened.
  - Q. What was the weather condition? A. Clear.
  - Q. How fast were you running between W. Stockbridge and where the accident occurred? A. 15 m.p.h.
  - Q. When did you last observe that the light on the tender was burning? A. When I put it out at State I ine.
  - Q. It was burning after the accident? A. Yes.
  - Q. When you were backing up did you notice any automobiles on your side of the crossing? A. Yes,

there was one on the hill approaching the crossing.

- Q. Did you notice any on the other side? A. No, I can't see the crossing on account of the tender.
- Q. You only seen that one car standing there? A. Yes. Just the one.
- Q. What was the first intimation you had of the accident? A. I heard this peculiar noise and the fireman hollered that we have got a car. I put the brakes in emergency.
- Q. Give her sand? A. Yes.
- Q. When the engine stopped how far was the engine north of the crossing? A. 1½ to 2 pole lengths.
- Q. What was the weather condition at that time? A. Clear.
- Q. After you stopped did you get off the engine? A. I went back to see what damage was done.
- Q. What did you find? A. This Ford Coupe down the bank.
- Q. Was it on its side? A. I would say it was it was tipped at a ninety degree angle.
- Q. Which way was the auto traveling? A. Toward West Stockbridge pretty near due east.
- Q. Assuming that the Railroad is north and south as your time table says which way would the automobile be traveling? A. Coming from the east going west.
- Q. When you got back there what did you find? A. This overturned Ford Coupe with this lady and gentleman in it.
- Q. Where was the lady when you seen her? A. On the ground laying down. The door was open.
- Q. Was she conscious? A. No.
- Q. Did you help to take her out of the car? A. No.
- Q. Was she alive? A. Yes, she was breathing but unconscious. I don't know how she got out on the ground.
- Q. Did you help take the man out? A. No, I did not.
- Q. What was his position in the car? A. He was pinned in by the steering wheel.
- Q. Did you make any inspection of the engine? A. Yes.
- Q. What did you find? A. The step on the tank bent and the step on the engine broken.
- Q. That would indicate that he ran into the side of the tank and was not dragged or pushed by the front of the tank? A. No, he hit with force to throw him against that pole and down the bank.
- Q. Did you notice any marks on the telephone pole? A. No, I did not.
- Q. Do you drive an automobile? A. Yes.
- Q. Have you driven over that crossing? A. Every day going to work and going home daily as much as anyone.
- Q. What kind of a road is it? A. State Road, rough it isn't cement, macadam.
- Q. In your experience in driving over that crossing how far back on the highway could you see a headlight of an approaching train? A. Why half a mile right near that house up there.
- Q. There is a little bridge down there how far is that from the tracks? A. 100 feet.
- Q. You would be able to see a train from there and stop in time for it? A. Yes, sir, if you had any brakes at all.
- Q. Assuming that you were traveling 15-18 m.p.h. how long would it take you to stop? A. About a car length.
- Q. When you applied the brakes did they function perfect? A. Yes, sir, 100%.

#### Mr. Christie [of the Massachusetts Public Utility Commission]:

- Q. From what you saw the man was the driver of the car? A. Absolutely he was behind the wheel.
- Q. Where was your engine when you applied the brakes? A. I was over the crossing. I put the brakes on after he hit. It was all simultaneous. I heard the noise, the fireman hollered and I put the brakes on. Even if the fireman did not holler the action would have been the same.

either party, Frank began his discussion with this issue.

Because Frank's opinion was an effort to affirm the judgment, it was structured to close off all avenues of escape from the sanction of the hearsay rule. Frank first assessed whether there was any applicable exception to the hearsay rule in the common law of evidence. Of course, the reason for the reform statute was precisely because the common law prohibited the introduction of the business report, so the conclusion to Frank's assessment was foregone. Because the statement was "so plainly barred at common law," the only question remaining was whether the federal statute made the statement admissible. 119

What was crucial, according to Frank, was the court's interpretation of the words "regular course of business" as used in the statute. These words, "twice employed in the legislation, are not colloquial words, but are words of art, with a long history." As a term of art, this phrase, which might to a layman "seem to mean any record or paper prepared by an employee in accordance with a rule established in that business by his employer," actually meant in the "jargon of lawyers and judges" only those records made in which there were "some safeguards against the existence of any exceptionally strong bias or powerful motive to misrepresent." Because the common law history of the business records exception was rooted in the requirement of an absence of a motive to misrepresent, any statute using the phrase "regular course of business" "would, therefore, require unequivocal expressions in the statute or its legislative history to yield an interpretation of those words, defying their history, which would render admissible a memorandum made in circumstances that disclose the strongest likelihood of the existence of a motive to misrepresent." 122

To prove that the statute did not include this "unequivocal expression," Frank looked at the history of the reform statute, including its implementation and interpretation in New York. New York's interpretation was important in understanding the federal act because it was a "general rule that where a statute has been previously enacted in another jurisdiction, interpretations . . . in another jurisdiction are to be followed." These constructions were "peculiarly persuasive where the statute is designed to be

Signed HAROLD D. MCDERMOTT.

Record, supra note 59, at 496-99 (Defendants' Exhibit J for Identification).

118. In so holding, Frank concluded that the common law exception for business records was dependent on the declarant having "no peculiarly powerful motive to misrepresent; such a motive, if it exists must be relatively minimal and marginal." *Hoffman*, 129 F.2d at 980. In Frank's view, "the absence of any vigorous motive to misrepresent . . . is inherent in virtually all the exceptions to the hearsay rule, such as declarations about private boundaries, statements or records concerning family history, spontaneous declarations, and dying declarations." *Id.* at 981.

Q. Your engine was in good mechanical condition? A. Yes, sir.

I have read my statement consisting of 4 pages and it is true and correct.

<sup>119.</sup> Id. at 983.

<sup>120.</sup> Id.

<sup>121.</sup> Id. at 984 (emphasis in original).

<sup>122.</sup> Id.

<sup>123.</sup> Id. at 985.

'uniform.'"124 Although the most well known New York precedent appeared to be Johnson v. Lutz, 125 Morgan had already noted a crucial difference between Lutz and Hoffman: Unlike the bystanders in Lutz, who "voluntarily" provided the information to the police officer whose report was offered as evidence, the engineer McDermott was under a duty to make a statement concerning the accident. Avoiding Lutz, Frank turned instead to a decision of the Appellate Division of the New York Supreme Court, Needle v. New York Railways Corp. 126 Needle was decided shortly before the decision of the Court of Appeals in Lutz. In Needle, the Appellate Division reversed the trial court and held inadmissible a police blotter which contained statements made to the officer by by standers as well as the conductor of the trolley car which struck the plaintiff as she was crossing Lexington Avenue in New York City. According to Frank, the court held the police blotter inadmissible in part because "his report was based on the oral statement of others, including, as the court said, that 'of the interested motorman, who, instead of being so placed as to be presumed to be without a motive to falsify in helping to make the record, had every reason to give a biased and false report." When Congress passed the reform statute in 1936, "[n]o change in its verbiage was suggested or was made to indicate an intention to deviate from that reasonable New York interpretation."128 A "not inflexible" rule of statutory construction required courts to follow the "reasonable" interpretation of a statute previously interpreted in another state, so Frank concluded that "the Needle case . . . should be followed as entirely reasonable." 129

To prove that *Needle* reasonably interpreted the reform statute and the phrase "regular course of business," Frank developed four lines of attack. First, he suggested the main reason for the statute may simply have been a dissatisfaction with the authentication requirement of the common law. Second, he concluded that it was "without doubt" that the sponsors of the Model Act, Wigmore and Morgan, "did not intend to abolish the exception and to substitute another, by giving that phrase a meaning precisely opposite to that which they well knew was its recognized meaning." Third, "[i]t is our function to find out what Congress intended," and "we must not allow our personal preferences for

<sup>124.</sup> *Id*.

<sup>125. 170</sup> N.E. 517 (N.Y. 1930).

<sup>126. 237</sup> N.Y.S. 547 (N.Y. App. Div. 1929).

<sup>127.</sup> Hoffman, 129 F.2d at 984-85 (quoting Needle, 237 N.Y.S. at 549) (emphasis added by Frank).

<sup>128.</sup> Id. at 985.

<sup>129.</sup> *Id*.

<sup>130.</sup> Frank noted that the Commonwealth Fund Evidence Committee criticized the common law rule for requiring the testimony of every person who was involved in the transaction, so "[o]ne reading the report of the Committee might, therefore, reasonably assume that perhaps its chief purpose was the desire to avoid the necessity of proving each link of such a chain." *Id.* at 986.

<sup>131.</sup> *Id.* (emphasis in original). At a slightly later point in the opinion, Frank wrote: It is suggested that Morgan and Wigmore have said that it was intended that such reports should be admissible. But we have been unable to find that either of them has ever published any such comments, i.e., that they have ever discussed the problem which is here before us, in a case arising under the statute, either vis a vis the Needle case or otherwise.

*Id.* at 990. But Frank had corresponded privately with Morgan, and knew Morgan's opinion regarding the "problem . . . here before us," something he did not share publicly.

a more extensive reform to govern our decision."<sup>132</sup> Because Congress chose to use rather than omit the phrase "regular course of business," and because those words enjoyed a specific historical meaning, "[w]e must assume that Congress used them deliberately with recognition of their history."<sup>133</sup> Fourth, Frank concluded that even assuming the *Lutz* case was erroneously decided, <sup>134</sup> Needle was clearly distinguishable from *Lutz*. <sup>135</sup>

In conclusion, then, engineer McDermott's statement was not admissible, because it "by its very nature, is dripping with motivations to misrepresent." After canvassing and distinguishing any possible precedent in the Second Circuit, Frank concluded, "to repeat, we know of no case in any court holding, or even intimating, that such an obviously motivated record as that here before us is admissible under that Act." 137

To close the circle, and as if he were attempting to persuade Morgan, Frank noted the following: (1) The element of an absence of a motivation to misrepresent did not return the state of evidence law to the primitive days of a century ago, for both Wigmore, in his *Treatise*, and Learned Hand, in a recent decision, had noted the importance of a motive to speak the truth in admitting statements otherwise barred by the hearsay rule; (2) the requirement of an absence of motive to misrepresent did not create an unworkable standard, for like all questions of degree, it did not leave "the extent of the disqualifying motive under § 695 at large." For Frank, it was clear that the statute did not permit the introduction of accident reports "where the primary purpose of the employer, obvious from the circumstances, in ordering those accidents is to use them in litigation involving those accidents"; 138 (3) the railroad never argued that the presence of the Massachusetts Utilities Commision representative made the report admissible as a public record, although in dictum Frank declared this a futile effort; 139 and (4) the death of engineer McDermott before trial made no legal difference. There existed no common law

<sup>132.</sup> Id. at 987. These quotes are in the reverse of Frank's order.

<sup>133.</sup> *Id.* at 986. Frank then quoted extensively from the COMMITTEE REPORT, *supra* note 47, concluding that the "limited objective at which Congress was in fact driving" was to eliminate the onerous authentication requirement. *Hoffman*, 129 F.2d at 987. This material was added to the opinion after it was first released.

<sup>134.</sup> Frank apparently did not share this assumption, for he used a classic appeal to authority for the correctness of the *Lutz* decision, noting that it was "unanimous," written by Judge Lehman, "who had previously indicated that the regular entry exception ought to be liberally construed," and joined by Judge Cardozo, "who had not only written in a similar vein, but was also a member of the Legal Research Committee of the Commonwealth Fund, which sponsored the Model Act." *Hoffman*, 129 F.2d at 990 (footnotes omitted).

<sup>135.</sup> Among the differences between the two cases were that, apparently unlike the bystanders in *Lutz*, the motorman in *Needle* possessed personal knowledge of the accident and "was probably under a duty to state the facts to the investigating policeman." *Id.* For my criticism of this interpretation, *see infra* text accompanying notes 191-206.

<sup>136.</sup> Hoffman, 129 F.2d at 991.

<sup>137.</sup> Id. at 993.

<sup>138.</sup> Id. The Supreme Court relied on this formulation of Frank's decision in affirming the Second Circuit decision. "In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. . . . [T]hese reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading." Palmer v. Hoffman, 318 U.S. 109, 114 (1943).

<sup>139.</sup> Hoffman, 129 F.2d at 993-94.

exception to hearsay based on the death before trial of the declarant, and the reform statute was worded without regard to the availability of the maker of the statement. Additionally, Rule 503(a) of the ALI's Model Code of Evidence, which permitted the introduction of hearsay statements upon a showing of the declarant's unavailability, was, as Frank noted, merely a proposed statute, which gives courts no authority. Thus closed, the exclusion of the engineer's statement did not constitute error.

Clark wrote a blistering, and blustery, dissent. Because the decision "seems to me directly opposed to the intent of the statute, as shown by its plain terms as well as its history and background," and because the decision "originates a process of restrictive interpretation of the statute which we have hitherto unanimously repudiated," Clark dissented. Above all, Clark noted, "zeal against reform is as much to be guarded against as zeal for reform."

After quoting pertinent parts of the statute, Clark noted that the engineer's statement was "direct relevant testimony of the kind which any court of justice ought to desire to admit." Not only was the fear of a motive to misrepresent "a reason which went out of favor a century ago," but "if the turning point is the degree of possible motivation, then we have a hopelessly unfair subjective test depending upon the intial brusque reactions of the trier." As for the argument that creating a record for use in a lawsuit made it

<sup>140.</sup> This is why Appleton, unsuccessfully, and later Thayer, successfully, suggested reforming the rules to admit a statement made by one who died before trial. Frank did not note the Massachusetts law, originally passed in 1898 at Thayer's behest, which permitted the introduction of hearsay statements made by persons who had died before trial, as long as the statement was made in good faith before commencement of the litigation. See MASS GEN. L. ch. 233, § 65 (Ter. ed., 1932). Because the case was tried in federal court, all "procedural" rules, including all "procedural" rules of evidence, were based on federal, not state, law. See Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938). Had the case been tried in Massachusetts, the statement might have been admissible under Massachusetts law. Cf. Nagle v. Boston & N. St. Ry., 73 N.E. 1019 (1905) (holding admissible a self-serving statement of a motorman offered by his estate in the action arising from the conduct which the statement favorably explained).

<sup>141.</sup> Hoffman, 129 F.2d at 995.

<sup>142.</sup> Both of the other two claims of evidentiary error were troublesome as well, although reversal was not required. The decision of the trial judge permitting the plaintiff to introduce into evidence a statement written by a witness before trial if defense counsel requested to peruse it was error, but not reversible error, for two reasons. One reason was waiver, for Brumley had not requested the trial court to certify the statement to the court of appeals, so it was not in the record. The second reason was that Brumley, representing the same party in a case two years earlier, had successfully argued in favor of the rule he was now complaining about! *Id.* at 997-98. (This part of Frank's opinion is noteworthy for his facility in citing Santayana, Vaihinger, Montaigne, Maitland, Henry Maine, Roger Bacon and Herbert Spencer, among others, in a mere two pages). The refusal of the trial court to permit a defense witness to testify to certain observations made by him was apparently not in error because the conditions about which the witness was to testify were not "identical" or "comparable" (Frank uses both standards) to the circumstances at the time of the accident. *Id.* at 998.

<sup>143.</sup> Id. at 999 (Clark, J., dissenting).

<sup>144.</sup> Id.

<sup>145.</sup> Id.

<sup>146.</sup> Id. at 1000. Clark reiterated this point at the end of his dissent: "Stress is laid on the existence of a powerful motive to misrepresent; but what constitutes such a motive is left at large, seemingly to the hasty

unreliable, Clark noted that the Second Circuit had already rejected that in *United States* v. *Mortimer*, <sup>147</sup> and suggested that "the purpose and the value of records were their use in future disputes—to prevent many, to settle others." Most importantly to Clark, the majority's narrow interpretation of the business records reform statute was flawed because it failed to recognize "what the trend of the times is," a trend of liberal interpretation of the rules of evidence.

### B. The Dispute Among Frank, Clark and Morgan

At about the same time Frank was soliciting advice from Morgan, he was doing the same with the other members of the Second Circuit, Senior Circuit Judge<sup>150</sup> Learned Hand,<sup>151</sup> Learned's cousin Augustus Hand,<sup>152</sup> and Harrie Chase.<sup>153</sup> From Frank's appointment in May 1941, until Learned Hand's retirement in 1951, the membership of the court remained the same. During that time, the court's reputation as the second most important court in the country was solidified.<sup>154</sup> However, as one scholar of the Second Circuit has noted, "From not long after Jerome Frank took his seat on the Second Circuit

discretion of the trier, in the midst of a case." Id. at 1002.

- 118 F.2d 266, cert. denied, 314 U.S. 616 (1941). In Mortimer, decided a little over a year before Hoffman, the Second Circuit permitted the government to introduce several charts showing defaults by defendants of mortgaged properties, even though the charts were made in preparation for the trial. Id. at 270. The decision was written by Judge Clark for a panel that included Learned and Gus Hand. Because his conclusion was not solely based on the fact that the statement "was made after litigation was imminent," Frank considered Mortimer distinguishable. Hoffman, 129 F.2d at 991-92. Clark also noted that the decision of the majority "sets aside quite peremptorily the reasoning of several unanimous decisions of this court." Hoffman, 129 F.2d at 999 (citing, in addition to *Mortimer*, Hunter v. Derby Foods, Inc., 110 F.2d 970 (2d Cir. 1940) (death certificate of coroner indicating death from ptomaine poisoning), Ulm v. Moore-McCormack Lines, 115 F.2d 492 (2d Cir. 1940), reh'g denied, 117 F.2d 222 (2d Cir. 1941), cert. denied, 313 U.S. 567 (1941) (hospital records offered by defendant to prove plaintiff's injury a result of drug use); and Reed v. Order of United Commercial Travelers, 123 F.2d 252 (2d Cir. 1941) (hospital record of diagnosis of plaintiff indcating "still apparently well under influence of alcohol") (cases in the order given by the court)). In each of these cases, Clark was a member of the panel, and in each case the court found the business record was admissible under the federal business records statute. In addition to his opinion in Mortimer, Clark also wrote both opinions in Ulm. Frank was a member only of the panel that decided Reed, a per curiam opinion. Frank believed all of these cases were distinguishable, either because there existed no "impelling motives to misrepresent" or because the records involved in those cases were more "trustworthy," or because the Second Circuit followed Lutz or failed to distinguish (or cite) Needle. Hoffman, 129 F.2d at 991-92.
  - 148. Hoffman, 129 F.2d at 1000 (Clark, J., dissenting).
  - 149. Id. (footnote omitted).
- 150. In 1948, the term "senior circuit judge" was replaced by "chief judge." SCHICK, *Supra* note 9, at 5 n.1.
  - 151. On Learned Hand, see GUNTHER, supra note 87.
  - 152. On Augustus Hand, see Charles Wyzanski, Augustus Noble Hand, 61 HARV. L. REV. 573 (1948).
- 153. See SCHICK, supra note 9 at 26-29; JEFFREY B. MORRIS, FEDERAL JUSTICE IN THE SECOND CIRCUIT 143 (1986).
- 154. Wyzanski, *supra* note 152; Frank, *supra* note 88. A later appraisal by a former law clerk is Philip Kurland, *Jerome N. Frank: Some Reflections and Recollections of a Law Clerk*, 24 U. CHI. L. REV. 661 (1957).

until the retirement of Learned Hand a decade later, the outstanding feature of the court's work—except for the decisions handed down—was the virtually uninterrupted friction between Judges Clark and Frank, the court's junior members." The actions taken by Frank and Clark in the *Hoffman* case played some role in the deterioration of their relationship.

Shortly before the court's decision in *Hoffman* was first released, Frank and Clark exchanged letters accusing each other of improper action concerning the case. During the course of writing his opinion, Frank wrote to Clark on June 22, 1942 that he had

discussed the question with Learned and Gus. Both of them disagreed with me. I, therefore, suggested that I ascertain how Harrie felt; I said to Learned and Gus that, if four of the six of us agreed with you, I felt it unwise that Tom and I should decide the question. Learned said No.<sup>157</sup>

Frank then claimed that after he and Clark discussed the matter with the Hands, Clark sent his dissent to them, which forced Frank to "show Gus mine." In Frank's view, Gus's reaction was, "He had previously felt the evidence admissible; my opinion made him less sure." Frank also told Harrie Chase about "both sides" and Harrie's "inclination was toward my views of the question." Clark, a supporter of *en banc* decisionmaking, responded: "Under the circumstances . . . I do not believe it is proper to say that Gus has shifted ground or that Harrie has passed upon the matter. All that it is possible to say is

- 155. SCHICK, *supra* note 9, at 219.
- Jerome Frank (June 23, 1942) (Frank Papers, *supra* note 110, at Conference Memoranda File, Box 92, Folder 766). Clark, who did most of his work in New Haven, apparently preferred written exchanges to face-to-face conversations, in large part because he did not consider himself a felicitous debater. As noted above, Frank was a delightful, combative and persuasive conversationalist. But Clark apparently decided to try to see Frank regarding their disputes over *Hoffman* and the *Corning Glass* cases. *See* Letter from Charles E. Clark to Jerome Frank (July 1, 1942) (Frank Papers, *supra* note 110, at Box 120, Folder 1158) ("I stopped in to see you after our conference Monday, but we did not get through until late and you had gone.").
- 157. Letter from Jerome Frank to Charles E. Clark (June 22, 1942) (Frank Papers, *supra* note 110, at Conference Memoranda File, Box 92, Folder 766). *See also* Letter from Jerome Frank to Charles E. Clark (July 6, 1942) (Frank Papers, *supra* note 110, at Box 120, Folder 1158), in which Frank writes:

As I've told you before, I then said to Gus and Learned (before you knew anything about their views) that I thought I should ascertain how Harrie would view the matter and that, if he agreed with you, the decision should go your way, as then Tom and I would be a minority of two out of six. Learned said, No. Then, when you came to town, you, Learned, Gus and I discussed the matter at lunch and Learned said he was opposed to a six-judge court. Then you sent Gus and Learned your dissent. Only then did I give Gus my draft of opinion. He said it made him somewhat less sure of his earlier disagreement with me. Learned didn't see my opinion (unless he's read it since it's been printed) and I don't know his reaction. I chatted with Harrie who said he thought he'd probably agree with me, but I told him to wait until my and your opinions were published.

Learned Hand opposed en banc decisions. SCHICK, supra note 9, at 102, 105.

158. Letter from Jerome Frank to Charles E. Clark (June 22, 1942) (Frank Papers, *supra* note 110, at Conference Memoranda File, Box 92, Folder 766).

that the court is seriously divided on the question, and it is one which certainly ought to have gone before the full court." <sup>159</sup>

By asserting that Chase's "inclination" tended toward Frank and Swan's position, Frank was now able to claim he was no longer in a position of arguing a minority view. The additional claim that Augustus Hand was "less sure" of his initial position made Frank's position even more tenable. For someone as sensitive to criticism as Frank, his efforts to informally persuade the members not on the panel to his position may have been important, particularly because he knew that the criticism voiced in Clark's dissent was likely to be joined by Morgan.

Part of Frank's problem concerning his emendation of the business records exception was that both Hands served as members of the Advisory Committee to the Model Code of Evidence, which Committee proposed a business records rule "based upon the Act recommended by the Commonwealth Fund Committee, which has been enacted by Congress." This was, of course, the Act at issue in *Hoffman v. Palmer*. Additionally, Frank's predecessor on the Second Circuit, Robert P. Patterson, was also a member of the Committee on Evidence. Finally (and speculatively), the fact that the case came from Abruzzo's court would not have aided Frank's cause, although the practice of the Second Circuit at this time was not to name the trial judge in its opinion, and it is unclear whether the Hands were aware that Abruzzo was the trial judge.

Apparently looking for support, Clark sent the slip opinion to Morgan. Morgan angrily wrote to Frank:

Charlie Clark has sent me the opinions in the Hoffman case. I must say that you have done a fine job in statutory emasculation. If we should have a few more decisions like yours construing the business entry statute, we should get back almost to the common law rule. The idea that a business entry is inadmissible because the entrant had a motive to misstate, is the idea which made the English common law courts reject all business entries except when made by a servant in the course of duty. It played almost no part in the development of the modern rule in the United States, and was not regarded as an essential element of the rule in the great majority of cases. Every business entry charging another with an obligation to the entrant or to the entrant's employer has some of the characteristics of a self-serving statment, but I do not want to argue the matter with you. I merely want to point out that in emphasizing this uncertain element in the common law rule, you have totally disregarded the language of the statute. The decision is all the more surprising to me coming, as it does, from a man whom I had always regarded as a liberal thinker in the law. Perhaps your liberalism is confined to substantive matter and perhaps your

<sup>159.</sup> Letter from Charles E. Clark to Jerome Frank (June 23, 1942) (Frank Papers, *supra* note 110, at Conference Memoranda File, Box 92, Folder 766).

<sup>160.</sup> See MODEL CODE OF EVIDENCE at III (1942) (listing members of the ALI's Committee on Evidence).

<sup>161.</sup> Id. at 271 (comment to Rule 514, entitled "Business Entries and the Like").

<sup>162.</sup> Id. at III.

<sup>163.</sup> SCHICK, supra note 9, at 138-39.

faith in the common law processes of adjudication does not equal your faith in the administrative process.<sup>164</sup>

Frank's response to Morgan's one-page letter was an eight-page missive. 165 Beginning with "[i]f a judge says something with which E.M. Morgan disagrees, he's a reactionary, who doesn't take the judicial process seriously, and who is a careless, unscholarly, worker,"166 Frank continued with several different defenses of both the decision and his actions. He became a judge only because he took the judicial process seriously, and although there was room for "judicial legislation," "we'll give the judiciary a black eye" "if we judges go to construing statutes so as to achieve results we like, without regard to the intention of Congress."167 Even though Frank believed "the hearsay rule should probably be abolished," it was his duty to follow Congress's intentions, which were ascertainable from the Senate Judiciary Committee Report on the business records statute. 168 As the author of the Commonwealth Fund Committee proposal, on which the federal business records act was based, Morgan was probably the "worst person" to construe the statute. And Frank noted that Morgan himself had published nothing which "hinted" that the statute (or its predecessor reform proposals) was intended to go beyond eliminating the common law requirement that each entry maker authenticate his entry. Frank then cited Wigmore's *Treatise* for support that the motive to misrepresent was clearly a part of the history of the rule concerning the admissibility of business records. Penultimately, Frank used his abhorrence of the jury trial to defend his interpretation: "Except in criminal cases, I think the jury should be eliminated. It is, to my mind, the

- 164. Letter from Edmund M. Morgan to Jerome Frank (July 3, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 10). Morgan also wrote a short note that day to Clark, telling him that he had also written Frank and that, "you took him to town in your dissent, and I am puzzled to know why Tom Swan agreed with him." Letter from Edmund M. Morgan to Charles E. Clark (July 3, 1942) (Morgan Papers, *supra* note 106, at Box 5, Folder 10).
- 165. Letter from Jerome Frank to Edmund M. Morgan (July 8, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 10). All quotations in the paragraph that follow are taken from this letter.
- 166. In the final version of the *Hoffman* opinion, Frank wrote, "[o]ur decision here is no less liberal than the decisions of other state or federal courts interpreting the Model Act." *Hoffman*, 129 F.2d at 993. This passage was written before Frank received the July 3 letter from Morgan, but I believe it is reasonable to speculate that this was Frank's attempt to justify to Morgan, with whom he had earlier corresponded, as well as to himself (and maybe Clark) that he was not a "reactionary," but remained a "liberal."
- 167. Frank continued: "And we so-called 'liberals' ought to be singularly careful in that respect. We've beefed about the way the 'reactionaries' on the bench killed off legislation by excessive use of judicial legislation. We ought not now use the same devices with reverse English." That liberals feared being charged with excessive use of judicial legislation after the constitutional revolution of 1937 is discussed in Michael Ariens, A Thrice-Told Tale, or Felix the Cat, 107 HARV. L. REV. 620, 667-74 (1994).
- 168. Frank extensively quoted the Report to Morgan, and noted that he had failed to discuss the Report when defining "regular course of business" in his initial opinion. Possibly because of Morgan's response to Frank, the *Hoffman* opinion was revised and when released for official publication on July 31, 1942, included the information from the Senate Judiciary Committee Report in order to show the intent of Congress concerning the business records statute. *See Hoffman*, 129 F.2d at 987-90.

worst possible means of factfinding. More than any other factor, it tends to emphasize the trial as a mere game of wits." Special verdicts might bring some "sense" to the "jury system," but opposition to this, as well as to "juries of experts" led to "a hopeless mess." To prove that he was not a stickler for antiquated rules of evidence, including hearsay rules, Frank concluded, "As emotions—and not evidence or the court's instructions—determine verdicts, without possibility of control, I see little harm in letting in anything. For, the more you let in, the more there is for the jury to disregard." Finally, in a postscript, Frank again made an appeal to authority, noting that Cardozo joined the unanimous opinion of the New York Court of Appeals in *Johnson v. Lutz*, and asserted, as he had with Clark, support from the other Second Circuit judges: "[D]on't be too sure that the judges of this court, other than Charlie, wouldn't go along with the majority opinion in *Hoffman v. Palmer*."

In a brief response, <sup>170</sup> Morgan disclaimed calling Frank "either a reactionary or a fool," but reiterated his belief that the "opinion seemed to me to over-emphasize the statements in business entry cases and to rely upon what seemed to me outworn cautionary generalizations instead of accepting the general attitude of the forward-looking courts." Morgan promised a longer reply, which was sent on August 15, 1942. <sup>172</sup> Morgan again criticized Frank for "taking the traditionally conservative attitude toward procedural reform," unlike the "forward-looking" approach Frank had "as an administrative officer and on question[s] of social policy." Morgan agreed that the author of a statute is "the last man to interpret it," but still thought that a reasonable interpretation of the Act was broader than Frank's interpretation. After disagreeing with Frank's recitation of the history of the phrase "regular course of business" and its relation to the absence of a motive to misrepresent, he wrote, "I do not think as badly of the jury as you do, or as you think that I do." For Morgan, although the jury was "a poor instrument for fact finding" in complex commercial cases, it was "likely to reach a socially just result" in tort cases. But "sensible decisions" were less likely as long as the rules of evidence

<sup>169.</sup> He then cited as support for this statement parts of his *Law and the Modern Mind*. Frank did not make clear why the jury was helpful to the criminally accused, particularly when it based its decision on "emotions." In his 1949 book *Courts on Trial*, Frank was more equivocal about the jury in criminal cases. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 136 (1949).

<sup>170.</sup> Letter from Edmund M. Morgan to Jerome Frank (July 10, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 10). All quotations following are taken from this letter.

Morgan professed "great doubts" whether the report would have altered the jury's verdict, and was more concerned that an "elaborate opinion by the Second Circuit, which is probably the best court in the country," gave life to a discredited approach to the rules of evidence. He concluded: "Let me assure you, Jerry, I am really flattered that you would pay so much attention to my opinion on a question of this sort." In response, Frank sent an opinion that he asked Morgan to read, and wrote, "It will serve to show that I'm not a hopeless reactionary in the field of so-called adjective law." Letter from Jerome Frank to Edmund M. Morgan (July 15, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 10).

<sup>172.</sup> Letter from Edmund M. Morgan to Jerome Frank (August 15, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 10). This letter was three pages in length. All quotations following are from this letter.

were based on "the notion that a lawsuit is a contest between adversaries who can limit the issues.... The less of a game you make of a lawsuit, the better job a jury will do." 173

As might be expected, Frank gave it one more try.<sup>174</sup> After informing Morgan that he was not "unaware" that the "intent of the legislature is, at times,' a fiction," Frank again argued that there was no need to rely on the fiction in *Hoffman*, for Congress meant what it said. Further, Frank's evaluation of pre-statutory precedent in the Second Circuit proved that the "element of motive" played a role in the history of the common law rule. Morgan's response was brief: "Thanks a lot for your letter of August 25. I suppose we might as well agree at this point to disagree."<sup>175</sup>

In the November 1942 issue of the *Harvard Law Review*, a note about the case was published.<sup>176</sup> Initialled "J.M.M." for Morgan's colleague and *Cases on Evidence* coauthor John M. Maguire, who was also the Assistant Reporter to the Model Code of Evidence Committee, the note began with a summary of the case. Maguire then complained, "Transgressors tread no harder way than do those who seek to liberalize the law of evidence." After years of effort, reformers accomplished only little change, in part because "an ameliorative act may find itself more or less strait-jacketed by strict judicial interpretation." *Hoffman v. Palmer* was another "manifestation of aversion to change." <sup>178</sup>

For the next several years, apparently in an effort to regain Morgan's favor, Frank occasionally sent copies of his opinions to Morgan. In November 1943, Frank sent Morgan his opinion in *Zell v. American Seating Company*, <sup>179</sup> and in the cover letter wrote: "Perhaps you'll consider the enclosed opinion . . . as some indication that I'm not a 100%

- 173. Morgan's response to Frank's claim that his hands were tied (Holmes's "can't helps") was to the point: "In short, Jerry, humility is a gown which fits you and your court very badly." Morgan concluded: "Notwithstanding this long letter, and my continued disagreement with the Hoffman opinion and with much in Law and the Modern Mind, I continue to be very fond of you, and am rejoiced in your progress in the public service." See supra note 172.
- 174. Letter from Jerome Frank to Edmund M. Morgan (August 25, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 6, Folder 1). This was merely a four page letter. All quotations following are from this letter.
- 175. Letter from Edmund M. Morgan to Jerome Frank (August 31, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 6, Folder 1).
- 176. J.M.M., Note, Hoffman v. Palmer: Admissibility at Common Law and Under the Model Act of Business Records Made by a Third Party with Incentive to Misrepresent, 56 HARV. L. REV. 458 (1942).
  - 177. Id. at 459.
- 178. Id. Nearly two decades later, in a symposium issue of the Vanderbilt Law Review honoring Eddie Morgan, Maguire contributed an essay on the "thicket" of the "hearsay system," and while praising reform of the law concerning the admissibility of business records, remarked, "Such wet blankets as Palmer v. Hoffman, 318 U.S. 109 (1943), are fortunately rare." John M. Maguire, The Hearsay System: Around and Through the Thicket, 14 VAND. L. REV. 741, 774 n.104 (1961).
- 179. 138 F.2d 641 (2nd Cir. 1943). Frank's opinion in *Zell* is a fascinating, and discursive, essay about the history of the parol evidence rule and its limited value and application in modern litigation. A by-product of this essay was the court's conclusion that the trial court's decision to grant summary judgment was erroneously based on its broad interpretation of the parol evidence rule.

reactionary."<sup>180</sup> In the next two years, Frank sent his opinions in *Buckminster's Estate v. Commissioner*, <sup>181</sup> and *Doehler Metal Furniture Co. v. United States*, <sup>182</sup> remarking in the cover letter included with the latter case, "In the enclosed, I've tried to learn from the best minds."<sup>183</sup>

In 1946, Morgan discussed the developments in the law of evidence during World War II. 184 Near the end of this lengthy survey, Morgan criticized both Frank's opinion in *Hoffman* and Justice Douglas's opinion for the Supreme Court in *Palmer v. Hoffman*. 185 Morgan's criticism of Frank's opinion was relatively mild: "The least that can be said is that [Frank's] approach to the interpretation of such an enactment is extremely unfortunate." 186 Morgan was much more critical of the Supreme Court's opinion, in

- 180. Letter from Jerome Frank to Edmund M. Morgan (November 19, 1943) (Frank Papers, *supra* note 110, at Box 61, Folder 631). If Frank was asking to be forgiven, Morgan was willing to accommodate. But Morgan was not going to forget: "You did not need to send me this opinion to convince me that you are not 100% reactionary. I know full well your liberal tendency, but I still can't get over the shock of your distorting the statute and excluding a statement made in the course of duty in the Hoffman case." Letter from Edmund M. Morgan to Jerome Frank (November 23, 1943) (Frank Papers, *supra* note 110, at Box 61, Folder 631). Frank's plaintive reply: "You have a hard heart. Isn't it an extenuating fact that nine Supreme Court justices similarly 'distorted' the statute?" Letter from Jerome Frank to Edmund M. Morgan (November 27, 1943) (Frank Papers, *supra* note 110, at Box 61, Folder 631).
- 181. 147 F.2d 331 (2d Cir. 1944). At the outset of his opinion, Frank held admissible pursuant to the federal business records statute a hospital record containing the conclusion that the taxpayer suffered a cerebral hemorrhage. Frank then criticized New York Life Ins. Co. v. Taylor, 147 F.2d 297 (D.C. Cir. 1944), which held inadmissible hospital records containing information concerning the insured's death (the issue was whether the death was suicide or accident). "We do not agree with the way in which Hoffman v. Palmer was interpreted in the Taylor case." *Buckminster's Estate*, 147 F.2d at 334. Morgan also criticized *Taylor*, and cited Frank's opinion in *Buckminster's Estate* for support. *See* Edmund M. Morgan, *The Law of Evidence, 1941-45*, 59 HARV. L. REV. 481, 565 (1946) ("[The *Taylor* Court's] reliance on the opinion of Judge Frank in the *Palmer* case seems to have been in error, for the Court of Appeals for the Second Circuit expressly disapproved the *Taylor* case in *Buckminster's Estate v. Commissioner.*") (footnote omitted). Interestingly, the opinion in *Taylor* was written by another famous legal realist, Thurman Arnold, then an Associate Judge of the United States Court of Appeals for the District of Columbia, and also a critic of the rationality of trials. *See* Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617 (1932); Thurman Arnold, ARNOLD AND FLEMING JAMES, CASES AND MATERIALS ON TRIALS JUDGMENTS AND APPEALS (1936).
- 182. 149 F.2d 130, 137 n.10 (2nd Cir. 1945) (citing with approval Morgan's work on the law of presumptions).
- 183. Letter from Jerome Frank to Edmund M. Morgan (May 9, 1945) (Frank Papers, *supra* note 110, at Box 61, Folder 631).
  - 184. Morgan, supra note 181.
  - 185. Morgan, supra note 181, at 565-67.
- 186. Morgan, *supra* note 181, at 565-66. Morgan then opined that Frank erroneously assumed "the inherent validity of . . . the common law instead of regarding the entire hearsay rule as an exception to the principle that a trier of fact should have the advantage of considering all available relevant data." Morgan, *supra* note 181, at 566.

which the business records statute "fared much more badly." After criticizing Douglas's interpretation of the historical basis of the business records statute, and his wrongly "taking judicial notice" of the fact that the reports were not part of the business of the railroad, he concluded: "It is said that James B. Thayer once remarked in effect that the greatness of the Supreme Court was not revealed in its decisions on questions of evidence. Elaboration would be superfluous." <sup>188</sup>

#### V. THE MEANING OF IT ALL

## A. The Opinion

Two aspects of Frank's opinion deserve some extended comment:<sup>189</sup> first, his reliance on *Needle v. New York Railways Corporation*;<sup>190</sup> and second, his apparent refusal to assess the statement made by the engineer McDermott.

1. Needle v. New York Railways Corporation.—In Frank's opinion, the federal business records statute was borrowed from the New York act. Consequently, to understand the meaning of the federal act, the court was required to ascertain the meaning of the New York act, and the meaning of the New York act was dependent on judicial interpretation of that act. Even assuming that one accepts the first premise, <sup>191</sup> why rely on Needle, an intermediate appellate decision, as the proper case to interpret the New York act, rather than the much more famous case of Johnson v. Lutz, <sup>192</sup> decided by the New York Court of Appeals, New York's highest court?

- 187. Morgan, *supra* note 181, at 566. Eighteen months after the Supreme Court released its *Palmer* opinion, Morgan wrote to Douglas complaining, "Now see what you went and done in the *Palmer* case, *New York Life v. Taylor*, 143 F.2d 14!" Letter from Edmund M. Morgan to William O. Douglas (August 31, 1944) (Edmund M. Morgan Papers, Vanderbilt University) [hereinafter Morgan Papers, Vanderbilt University] (copy on file with author). The Morgan Papers at Vanderbilt are not yet archived by box and folder number. Douglas replied, "It is tough to be held responsible for all progeny of a case. What principle of liability is that?" Letter from William O. Douglas to Edmund M. Morgan (November 1, 1944) (Morgan Papers, Vanderbilt University), *supra*.
- 188. Morgan, *supra* note 181, at 567. Five years later, apparently at the request of Charlie Clark, Morgan sent a reprint of this and other evidence articles to him. Clark then wrote a thank-you letter, concluding, "And of course I love your criticisms of Palmer v. Hoffman." Letter from Charles E. Clark to Edmund M. Morgan (September 17, 1951) (Morgan Papers, Vanderbilt University, *supra* note 187).
- 189. Frank's interpretation of the phrase "regular course of business" was subject to a searing comment in J.M.M., Note, *supra* note 176, at 462-65.
  - 190. 237 N.Y.S. 547 (1929).
- 191. It seems at least as accurate to say that both the federal and New York acts were borrowed from the Commonwealth Fund proposal, which would thus require some understanding of the intent of the framers of that proposal, in particular Morgan and Wigmore. Judge Clark had so interpreted the federal act in 1940 in Ulm v. Moore-McCormack Lines Inc., 115 F.2d 492, 495 (2d Cir. 1940) ("[T]his act did not come from the New York statute. Both in fact derive from the activities of a committee of experts on the law of evidence appointed by the Commonwealth Fund . . . . "). Frank ignored Clark's assertion, see Hoffman, 129 F.2d at 985, and later attempted to defuse this problem through his explanation of Morgan and Wigmore's views of Needle. Hoffman, 129 F.2d at 991.
  - 192. 170 N.E. 517 (N.Y. 1930).

As Frank noted, both Morgan and Wigmore had criticized the *Lutz* decision. <sup>193</sup> But this was of no consequence, for Frank claimed that "we may, arguendo, assume [*Lutz*], to have been wrong. . . . [I]t has no bearing whatever on the case at bar." <sup>194</sup> Instead, because the crucial precedent was *Needle*, the criticism of *Lutz* by Morgan and Wigmore was of no consequence.

In both *Needle* and *Lutz*, the dispute concerned the admissibility of a police blotter, in both cases the evidence was offered by the defendant as evidence exculpating the defendant, and in both cases the information recorded on the blotter was based on hearsay statements from third parties. And, finally, both cases were tort actions alleging negligent conduct on the part of an employee of the defendant. Frank noted only one factual difference, which he believed made *Lutz* "clearly distinguishable from the *Needle* case." <sup>195</sup> In *Needle*, "the report was excluded because of the motorman's probable bias even though (a) he was, of course, familiar with the facts, (b) he was probably under a duty to state the facts to the investigating policeman, and (c) the policeman, acting officially, was disinterested." <sup>196</sup> Therefore, *Needle* turned upon the issue of bias, rather than, as in *Lutz*, the issues of either the lack of personal knowledge of witnesses, <sup>197</sup> or lack of duty to report their observations. These differences, as Frank noted in his opinion, were "crucial," for *Needle* thus demonstrated that the motive to misrepresent was a crucial underpinning of the business records exception to hearsay.

The problem with Frank's analysis is that it "plays fast and loose" with the Appellate Division's opinion in *Needle*. Yes, the *Needle* court did note that the "interested motorman . . . had every reason to give[] a biased and false report," and Frank accurately quoted this part of the court's opinion. The first half of the statement, however, which Frank omitted from the *Hoffman* opinion, stated:

In the case at bar, to show that this record is inadmissible, it is only necessary to point out that the statements made to the policeman, upon which he based his report, were not made by any person in the regular course of any business, but, on the contrary, the report of the policeman was made upon the irresponsible

<sup>193.</sup> Hoffman, 129 F.2d at 990 & n.27.

<sup>194.</sup> Id. at 990.

<sup>195.</sup> Id.

<sup>196.</sup> Id.

<sup>197.</sup> In *Lutz*, the Court of Appeals merely stated: "It does not appear [from the police blotter] whether they saw the accident and stated to him [the police officer] what they knew, or stated what some other persons had told them." *Lutz*, 170 N.E. at 518. Frank interpreted *Lutz* as holding it error to admit:

a written hearsay report made by A who is under a duty to make it, where (1) A has no personal knowledge of the facts and (2) bases his report on the statement of B who himself has no knowledge of the facts and (3) who, not in the regular course of business of B's business, states what was told him by C who (4) had personal knowledge of the facts but did not state them to B in the regular course of B's or C's business.

Hoffman, 129 F.2d at 990, n.28. Element (2) of Frank's construction is not necessarily part of the Lutz holding, but simply indicates the Lutz court's awareness of another possible gap in the proof. A lay witness is rarely permitted to testify without personal knowledge of the testimonial matter. See FED. R. EVID. 602.

gossip of bystanders and the even more unreliable conclusion of the interested motorman. 198

With the addition of this language to the "holding" in *Needle* quoted by Frank, at least three possibilities emerge. First, the interested motorman was *not* believed by the court to have been under any duty to speak with the police officer, for the statements in the blotter "were not made by any person in the regular course of any business." This undermines Frank's conclusion that *Needle* was distinguishable from *Lutz* because the conductor "was probably under a duty to state the facts to the investigating policeman." Second, the court was as concerned with "the irresponsible gossip of bystanders," that is, with the witnesses' lack of personal knowledge, as with the fact that these were out-of-court statements offered as true, and thus hearsay. This again undercuts any factual distinction between *Lutz* and *Needle*. Third, the court may have considered the "conclusion" of the motorman an opinion rather than a statement of fact, and thus inadmissible because lay witnesses were limited to testifying to facts. <sup>201</sup>

With Needle distinguished from Lutz, and thus the proper authority to interpret the federal business records act, Frank then turned to Morgan and Wigmore's views of Needle. Frank first noted that Morgan had never publicly criticized Needle. Although Wigmore had criticized Needle, he had "overlooked entirely the crucial fact—differentiating Needle sharply from Lutz—that among 'the various persons' in Needle was the highly 'interested motorman.' Consequently, Frank could make the remarkable assertion that "[i]t is difficult to believe that, had [Wigmore] noted that distinguishing factor, he would have criticized the decision. Needle thus stood both unbloody and unbowed.

Frank lastly suggested another reason for relying on *Needle*: Because *Needle* "was decided before the Court of Appeals decided Johnson v. Lutz... there can be no doubt that the court which decided the Needle case... would be even more ready to exclude the company's document here." Indeed, the *Needle* court did not decide "because of the reasons given in the Lutz case, and criticized by Wigmore and Morgan, but because of the

<sup>198.</sup> Needle, 237 N.Y.S. at 549.

<sup>199.</sup> Id.

<sup>200.</sup> Hoffman, 129 F.2d at 990.

<sup>201.</sup> The court noted earlier in its opinion that the police blotter "contained the statement, 'Responsibility Pedestrian,'" which was based in part on the motorman's statements. The court may have believed that the statement "Responsibility Pedestrian" was an inadmissible conclusion of the officer, a lay witness without personal knowledge of the facts. *Needle*, 237 N.Y.S. at 548.

<sup>202.</sup> Hoffman, 129 F.2d at 991.

<sup>203.</sup> Id.

<sup>204.</sup> *Id.* I doubt it, for Wigmore was critical not just of *Lutz* but of any judicial interpretation limiting the admissibility of business records under the reform acts, and Wigmore championed this reform proposal as a member of the Commonwealth Fund committee and as chariman of the ABA reform committee. There is no private correspondence between Wigmore and Frank in the Wigmore papers at Northwestern, and I know of no published criticism of *Hoffman* by Wigmore before he died.

<sup>205.</sup> Hoffman, 129 F.2d at 990.

existence of that strong motive to misrepresent."<sup>206</sup> Again, Frank's statement is true but inaccurate. Yes, it was true that *Needle* was decided before the New York Court of Appeals decided *Lutz*. However, *Needle* was decided *after* the Appellate Division decided *Lutz*. Not only did the Appellate Division decide *Lutz* before *Needle*, the case was quoted in its entirety in *Needle* and was the only precedential case cited by the *Needle* court in support of its decision.<sup>207</sup> For Frank to suggest that *Lutz* and *Needle* were distinguishable on grounds that the latter did not rely on the former stretches credulity.

2. The Engineer's Statement.—Possibly the only thing missing from Frank's exhaustive opinion is the text of the statement at the heart of the dispute.<sup>208</sup> The format of the statement, a series of questions by an Assistant Superintendent of the Railroad answered by the engineer, could have suggested a misrepresentation of the facts. However, the statement itself refutes that suggestion. Frank's decision not to include the text of the statement in his opinion was made, in my view, because the statement did not include assertions "dripping with motivations to misrepresent" and thus did not support his conclusion.

Frank made two decisions concerning his evaluation of the engineer's statement. I believe both were mistaken. He made a behavioral claim without assessing the truth of the claim in light of the case, and he failed to assess the statement in context.

Not once in the opinion did Frank give an example of the bias in the statement. Frank apparently cared not at all about the statement itself. Because the statement was made after the accident, and because it was made by someone who was "very likely, in a probable law suit relating to that accident, to be charged with wrongdoing as a participant in the accident," the maker was "almost certain, when making the memorandum or report, to be sharply affected by a desire to exculpate himself and to relieve himself or his employer of liability." This is a behavioral claim. Frank gives no citation here to empirical work on human behavior. This claim is simply a given. As a theory of human nature, it may be true. And, if accepted as true and applied to law, this behavioral claim might have given rise to a rule requiring the trial court to assess the extent of the bias of

<sup>206.</sup> Id.

<sup>207.</sup> Needle, 237 N.Y.S. at 549. Before quoting Johnson v. Lutz, 234 N.Y.S. 328 (App. Div. 1929) in full, the Needle court stated: "This holding is also in accord with that of the Appellate Division, Second Department, in sustaining the exclusion of a police blotter under circumstances similar to those in the case at bar . . . ." Needle, 237 N.Y.S. at 549. The only other case cited in the entire opinion is Vosburgh v. Thayer, 12 Johns. 461 (1815), cited as the first New York case producing a "limited 'Shop Book' rule." Needle, 237 N.Y.S. at 548-49. See also Note, Admissibility of Business Entries: A Comparison of the Federal and New York Rules, 11 BROOK. L. REV. 78, 85 (1941) (concluding that Needle "rel[ied] primarily" on Johnson v. Lutz); Note, Judicial Interpretations of Section 374a of the Civil Practice Act, 4 St. John's L. Rev. 271, 272 (1930) (stating that Lutz and Needle presented situations that "were practically identical").

<sup>208.</sup> See supra note 117 for the text of the statement. The reader can speculate as well as I about Frank's reasons for not setting forth the engineer's statement.

<sup>209.</sup> Hoffman, 129 F.2d at 991.

<sup>210.</sup> Id.

<sup>211.</sup> Frank is also making a behavioral claim regarding the nature in which human beings would receive this information. That is, he is suggesting that a human beings sitting as members of a jury could not understand, and thus properly discount, such a statement.

a particular statement offered before admitting it into evidence or admitting the evidence and instructing the jury to receive the statement cautiously. But Frank made no effort to persuade the reader that his theory of human behavior was borne out in the statement. Instead, he simply relied on the "fact" that the statement "by its very nature, is dripping with motivations to misrepresent."<sup>212</sup>

In his 1949 book Courts on Trial, Frank wrote, "The basic aim of the courts in our society should, I think, be the just settlement of particular disputes, the just decision of specific law-suits."213 To achieve this, courts must "strive tirelessly to get as close as is humanly possible to the actual facts of specific court-room controversies. Courthouse justice is, I repeat, done at retail, not at wholesale."214 But Frank failed to heed his own advice. The Hoffman opinion is decided only at the wholesale level. Although Frank notes that the engineer's statement was given "two days after the accident," he never ties this fact to his conclusion of the engineer's bias. To do so would require some evidence that the purpose of the interview was to perpetuate the engineer's testimony, and that requires that the railroad knew or had reason to know both that it would be sued and that McDermott would die before trial.<sup>216</sup> Frank also never assessed, nor suggested that the trial court assess, McDermott's belief as of Friday, December 27, 1940, that his statement was being given at a time when an impending lawsuit was shortly to "charge" him with "wrongdoing." As with the motorman in Needle, McDermott's motive to misrepresent apparently arose immediately after the accident occurred and never dissipated.

One way in which to assess McDermott's motive to misrepresent is to look at what he said. Before the lawsuit was a twinkling in any plaintiff's eye, <sup>217</sup> McDermott claimed that the bell and whistle were sounded, and that the tender of the engine had a "good" back-up light attached to it. He also claimed that the back-up light was burning after the accident and was put out by him at some point after the accident. All of this information is exculpatory and thus subject to Frank's motive to misrepresent. However, McDermott also stated that he had not made a "test" of his air brakes before beginning to back up; that he could see out only one side of the engine; that after the accident Inez Hoffman was unconscious but breathing; that he did not help Howard Hoffman, who was

- 212. Hoffman, 129 F.2d at 991. The quotation of the word fact earlier in the sentence is mine.
- 213. FRANK, supra note 169.
- 214. FRANK, supra note 169.
- 215. Hoffman, 129 F.2d at 979.
- 216. I speculate that, if at all possible, Brumley would have called McDermott as a witness, which would have vitiated any need to introduce the written statement. My speculation serves to counter Frank's view that in this type of case it was "the primary purpose of the employer... to use [the statements] in litigation involving those accidents." *Id.* at 993. Additionally, unless Frank knew or suggested the likelihood that Cuineen and McDermott had rehearsed McDermott's "testimony" and that McDermott and the fireman Meach had rehearsed their stories, it is unclear how the railroad *primarily* intended to use McDermott's statement in any ensuing litigation. Meach was not cross-examined on this subject, and Cuineen was not called as a witness.
- 217. Howard Hoffman was unconscious and Inez Hoffman was dead. I suppose that Hulda Hoffman, the owner of the Ford coupe, might have thought about a lawsuit.
- 218. All of this is also cumulative in the sense that similar testimony was given by the fireman Meach. See Record, supra note 59, at 329-39.

pinned against the steering wheel, out of the car; and that he was backing up at between fifteen and eighteen miles per hour. He also denied questioner Cuineen's suggestion that the car "ran into the side of the tank," and, in response to Mr. Christie of the Massachusetts Public Utility Commission, stated that he did not put his brakes on until he "was over the crossing" and that he "put on the brakes after he [Hoffman] hit." All of this information can be perceived as harmful to the railroad's case. However, because no lawsuit had been filed, I fail to see how McDermott could have known that the particular claims of negligence decided by the jury would be failure to sound bell and whistle, or failure to light a proper backup light, rather than say, excessive speed or failure to look out. 220

Frank did not attempt to get as close to the facts as humanly possible. He chose rather to make broad assertions, assertions the record does not bear out.

## B. Hoffman and the Visions of Morgan and Frank.

In the summer of 1942, when Morgan and Frank were exchanging correspondence about *Hoffman*, Frank sent Morgan eight unpublished pages of a draft of the *Hoffman* opinion.<sup>221</sup> Frank's purpose in writing was to challenge directly the efficacy of Morgan's efforts to reform the rules of evidence. The result made relatively clear both the differences and similarities of Frank's and Morgan's visions about law and the legal process.

Morgan did not believe that the existence of the jury system fully explained the hearsay rule or other exclusionary rules of evidence, 222 although the existence of the jury was "in part responsible for a portion of the law creating and governing exceptions to the hearsay rule. 223 The traditional view connecting the jury with exclusionary rules of evidence led to the reflexive claim that hearsay reform was unnecessary or even harmful. Morgan's contrary view was that many exclusionary rules, including the rules on hearsay, were based on the mistaken (and contradictory) notions of widespread perjury, combined

<sup>219.</sup> See supra note 117. I suppose one could argue that McDermott was intentionally throwing these "harmful" facts into his statement to hide his motivation to misrepresent. Cf. Williamson v. United States, 114 S. Ct. 2431, 2435 (1994) (holding that Federal Rule of Evidence 804(b)(3), permitting the introduction of statements against interest, "does not allow the admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory").

<sup>220.</sup> In fact, the complaint did allege that defendants "ran the said locomotive and the cars attached thereto at a high and unlawful rate of speed at a place where it knew that special care should be exercised and [was negligent] in failing to keep a proper and vigilant lookout." Record, *supra* note 59, at 10; Complaint at 8. These issues were not, however, submitted to the jury.

<sup>221.</sup> Hoffman, excerpt of draft opinion, in Frank Papers, supra note 110, at Box 61, Folder 631. Frank requested Morgan return the draft, which he did, and thus it is found only in the Frank Papers. Much in this essay, and in Frank's letters to Morgan in 1942, is explored in greater depth in Frank's 1949 book, Courts on Trial. See FRANK, supra note 169, at 14-36, 80-102, 108-45.

<sup>222.</sup> Edmund M. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247 (1937). Morgan thus took issue with the work of James Bradley Thayer. *See id.* at 258 ("But the *dictum* of the great Thayer that the English law of evidence is 'the child of the jury' is, it is suggested with the greatest deference, not more than a half-truth." (footnotes omitted)).

<sup>223.</sup> Id. at 256.

with the belief that exclusionary rules would prevent the jury from hearing false evidence. The result of the application of those rules at trial was that the trial was not a rational proceeding designed for the settlement of disputes between litigants. The radical reform of hearsay was necessary to make trials more rational.

Frank considered the jury to be an incompetent fact-finding body largely because of its lack of training in the difficult "art" of fact-finding and its predilection for deciding cases based on emotion and sympathy, rather than the evidence. Frank believed several consequences flowed from this. Due in part to its lack of training, the jury was "a hundred times" less capable of accurately finding the facts than a judge. Because, in truth, the jury decided cases on emotion,<sup>224</sup> the exclusionary rules of evidence were unimportant,<sup>225</sup> and a relaxation of those rules would simply give the jury more to disregard.<sup>226</sup> Ultimately, the preferred solution was to amend the Constitution and abolish the jury in civil trials.

Both Frank and Morgan were proud to be "liberals" and "reformers." Both men were harsh critics of the sporting theory of justice.<sup>227</sup> In this, they followed a path well trod by Thayer, Wigmore and Pound.<sup>228</sup> Both desired a "rational" process for resolving disputes, and both believed the present system was in many respects "irrational." Finally, both agreed the goal of the legal system was to effectuate justice. However, their assent on these issues led to quite different conclusions. Morgan desired radical evidentiary reform liberalizing the admission of evidence. Frank desired the elimination or radical restructuring of the jury.

In his draft opinion, Frank accused Morgan of "acknowledging that a jury trial is not and cannot be converted into a 'proceeding for the discovery of truth by rational processes." The foundation of Morgan's reform efforts, then, was not to produce better

<sup>224.</sup> In his Hoffman draft, Frank wrote, "[E] veryone who has talked to those who have served on juries knows that the evidence often plays but a small role in jurors' deliberations." Hoffman, partial draft opinion, in Frank Papers, supra note 110, at Box 61, Folder 631. He cited no empirical data for this claim, instead citing Morgan's caustic review of the book Trial Technique by Irving Goldstein. Edmund M. Morgan, Book Review, 49 HARV. L. REV. 1387 (1936). Goldstein suggested, among other things, that the plaintiff's lawyer in a tort case seek jurors who will respond to an emotional appeal. Frank noted that Morgan acknowledged that Goldstein's conclusions were the product of real trial work. Frank should have known (and probably did know) better than to conclude that one man's experience proved his point. He was trying (not very successfully, in my view) to attack Morgan with Morgan's own words. For the same point, using the same example, see FRANK, supra note 169, at 121.

<sup>225.</sup> Frank may have modified his views on this by the time he wrote *Courts on Trial. See* FRANK, *supra* note 169, at 123 ("[Exclusionary rules] limit, absurdly, the court-room quest for the truth."); *id.* at 144 ("[I]f we have to have the jury, let us abolish, or modify, most (not all) of the exclusionary rules, since they often shut out important evidence without which the actual past facts cannot be approximated."). This sounds just like Morgan.

<sup>226.</sup> Hoffman, partial draft opinion, in Frank Papers, supra note 110, at Box 61, Folder 631.

<sup>227.</sup> See, e.g., Morgan, Foreword, supra note 54, at 11; FRANK, supra note 169, at 80-102.

<sup>228.</sup> See supra note 39.

<sup>229.</sup> Hoffman, partial draft opinion, in Frank Papers, supra note 110, at Box 61, Folder 631 (quoting Morgan, supra note 224, at 1389 (reviewing IRVING GOLDSTEIN, TRIAL TECHNIQUE (1935))). It was this statement in the Harvard Law Review which revived the Frank-Morgan correspondence in 1941. Frank wanted

factfinding by the jury, but to reduce the waste of time the rules brought to the trial and appellate courts. This is not quite accurate. Morgan was well aware that "the jury is often swayed by sympathy and prejudice" and also was quite well aware of the immense difficulty of finding the truth of "what actually happened, in a case where the facts are in dispute." But he believed a lawsuit could be made a "rational proceeding," and the only way in which to do that was to reform the rules of evidence. Frank is more accurate about Morgan's belief in "truth." After reading Frank's unpublished essay, Morgan's response was not to defend the trial as a search for the truth, but merely to claim that "[t]he less of a game you make of a lawsuit, the better job a jury will do. It is nonsense to say that a jury cannot with the aid of judges and counsel put a fair value upon hearsay." Although the probabilities of ascertaining the truth were more likely once evidence reform was in place, no guarantees could be made.

Frank travelled in a different direction. Frank proposed eliminating the jury because it was incapable of discovering the "true facts." In Courts on Trial, Frank claimed that "[m]any experienced persons believe that of all the possible ways that could be devised to get at the falsity or truth of testimony, none could be conceived that would be more ineffective than trial by jury." The existence of the jury "helps to keep alive this fight-theory" at the expense of Frank's preferred "truth theory." Frank accepted that the trial process, because human, was fallible. Mimicking Morgan, he concluded that the trial "can never be a completely scientific investigation for the discovery of the true facts." But because the goal of the trial was the truth, the judicial process should rely on experts to ascertain the truth. Such experts included judges and administrative experts.

to quote this statement in his book *If Men Were Angels* and wrote "Professor Morgan," asking to publish material from an article in Volume 49 of the *Harvard Law Review*. After some confusion (apparently Morgan clearly distinguished "articles" from "book reviews") and after chiding "Jerry" for not calling him "Eddie," Morgan granted permission.

- 230. Edmund M. Morgan, *Book Review*, 46 HARV. L. REV. 1203 (1933) (reviewing JOSEPH N. ULMAN, A JUDGE TAKES THE STAND (1933)).
- 231. Edmund M. Morgan, *Book Review*, 2 J. LEGAL EDUC. 385, 386 (1950) (reviewing FRANK, *supra* note 169).
- 232. Letter from Edmund M. Morgan to Jerome Frank (August 15, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 10). See also Morgan, Code of Evidence, supra note 54, at 539 ("A lawsuit is not a means of making a scientific investigation for the ascertainment of truth; it is a proceeding for the orderly settlement of a controversy between litigants.").
- 233. For Frank's use of this phrase, *see*, *e.g.*, *Hoffman*, 129 F.2d at 996; Zell v. American Seating Co., 138 F.2d 641, 645 (2d Cir. 1943); and FRANK, *supra* note 169, at 102.
- 234. FRANK, supra note 169, at 20. Included in the "many experienced persons" was Frank himself. See FRANK, supra note 169, at 108-25.
  - 235. FRANK, supra note 169, at 136.
  - 236. FRANK, *supra* note 169, at 99.
- 237. Hoffman, partial draft opinion, in Frank Papers, supra note 110, at Box 61, Folder 631; FRANK, supra note 169, at 126-27. Frank knew eliminating the jury was impossible and suggested jury reforms including the use of the special verdict, expert juries in commercial and other complex cases, intermediate fact-finders, eliminating most exclusionary evidence rules, recording jury-room deliberations, and training for jury service, FRANK, supra note 169, at 141-45, as well as "testimonial experts" to give opinions whether the witness

This seems a curious conclusion for one who proclaimed he was an "original" member of a sub-group of legal realists Frank called "fact-skeptics." The difference lay in a misunderstanding of the phrase. Frank's self-stylization as a fact-skeptic was not a claim that he was a cognitive relativist, for he believed devoutly in "true facts." As often as he placed the word facts in quotes, he spoke of getting as close as possible to what really happened. As Morgan noted in his review of Frank's book, there was an "overemphasis" on the "possibility of mistake and perjury" in litigation. Frank's "overemphasis" on mistake and perjury was a result of his desire to make the trial a search for truth.

What does *Hoffman* tell us? In terms of the law of evidence, it tells us that the fear of "false" evidence has always been used to caution against efforts proclaiming "radical reform." In terms of the legal thought of Jerome Frank, it suggests a caution to the picture of Frank as a "relativist." For all the difficulties in achieving it, the goal of the trial was truth, a goal that seems incompatible with the portrait of Frank as a cognitive relativist. It also suggests that Frank's reform proposals, based on the idea that truth is the goal of the trial, fit squarely within the tradition of evidence reformers like Appleton, Thayer and Wigmore. This also suggests that Morgan was more comfortable than Frank in living with the uncertainty of the adequacy of the jury's search for the truth. This also makes Morgan less a pillar of the legal establishment and more a radical reformer. Finally, it suggests a much shallower divide, a "difference in emphasis" as Morgan put it, between "realists" as exemplified by Frank, and "progressives" as exemplified by Morgan.

## C. The Effect on Hearsay Reform

One recurrent theme of the work of evidence reformers is optimism that the future will bring about a better day. From Thayer's *The Present and Future of the Law of Evidence*<sup>241</sup> to McCormick's *Tomorrow's Law of Evidence*<sup>242</sup> to Morgan's *The Future of the Law of Evidence*, the criticism of the present state of the law was leavened by suggestions for its future improvement. Among Thayer, McCormick and Morgan, the last

was lying, FRANK, *supra* note 169, at 100. Well before *Courts on Trial* was published, Morgan voiced his skepticism of the ability of judges to decide free of sympathy and prejudice. *See* Morgan, *supra* note 230, at 1203 ("To be sure, the jury is often swayed by sympathy and prejudice; but are trial judges motivated solely by intellectual impulses?").

- 238. FRANK, *supra* note 169, at 74. Included in this group as "perhaps" a fact-skeptic was Morgan. FRANK, *supra* note 169, at 74.
- 239. Morgan, *supra* note 231, at 387. Morgan continued: "[T]here is no solid ground for the conclusion that the perjured evidence is credited and that the result in the majority of litigated cases is not in accord with the essentials of the actual facts." Morgan, *supra* note 231, at 387. Frank did not limit this assertion to his books: "Perjury, of course, is pernicious and doubtless much of it is used in our courts daily with unfortunate success." Zell v. American Seating Co., 138 F.2d 641, 645-46 (2d Cir. 1943).
- 240. Letter from Edmund M. Morgan to Jerome Frank (August 11, 1933) (Frank Papers, *supra* note 110, at Box 14, Folder 166; Morgan Papers, *supra* note 106, at Box 5, Folder 4).
  - 241. James B. Thayer, The Present and Future of the Law of Evidence, 12 HARV. L. REV. 71 (1898).
- 242. Charles T. McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A. J. 507 (July 1938). On McCormick's career, see the tributes found at 28 TEX. L. REV. 3-22 (1949) and 40 TEX. L. REV. 176-92 (1961).
  - 243. Edmund M. Morgan, The Future of the Law of Evidence, 29 Tex. L. Rev. 587 (1951).

was the most pessimistic. Although Thayer claimed that the "rules are thus in a great degree ill-apprehended, ill-stated, ill-digested,"<sup>244</sup> if lawyers and judges kept in mind "a few comprehensive, fundamental principles . . . , our system might be vastly improved."<sup>245</sup> McCormick, writing shortly before the ALI began its work on the Model Code, concluded: "In actual jury trials the machinery of evidence rules, devised to filter the testimony for the untrained minds of the jurymen, has become too complex for use except to the limited extent . . ."<sup>246</sup> But the future held the opportunity for a "rational, simplified code of evidence."<sup>247</sup>

After the Model Code failed to be enacted in any state, Morgan was less sanguine. After quoting Greenleaf's extravagant praise of the law of evidence<sup>248</sup> and summarizing the numerous defects of the law of evidence, he wrote: "The picture I have painted is dark. To be sure, it is not, on the whole, so black as that which seemed a rosy pink to Greenleaf. A lawsuit much more nearly approaches a rational investigation than it did a hundred years ago. . . . But the entire subject needs revision."<sup>249</sup>

Of particular concern to Morgan was the lack of progress concerning the application of the hearsay rule. He praised Wigmore for bringing "order out of a chaos of decisions" concerning hearsay but believed that this order created the appearance of "a consistency and rationality which I believe non-existent." This appearance led the bar to accept the hearsay rules as the "crystalized wisdom of the ages," a perception that led to opposition to any reform. After applying a number of hearsay rules in a hypothetical (but not farfetched) case, Morgan concluded:

I submit that the combination of these rulings makes a demonstration that the hearsay rule as applied is not only illogical but absolutely irrational. It cries aloud for reexamination not only of its details but of its justification for existence. Its progress in the last century has been not forward but backward, and on the road to irrational nonsense.<sup>253</sup>

- 244. Thayer, supra note 241, at 74.
- 245. Thayer, supra note 241, at 72, 93-94.
- 246. McCormick, supra note 242, at 508.

- 249. Morgan, supra note 243, at 598.
- 250. Morgan, *supra* note 243, at 593.
- 251. Morgan, *supra* note 243, at 593-94.
- 252. Morgan, supra note 243, at 594.
- 253. Morgan, supra note 243, at 597.

<sup>247.</sup> McCormick, *supra* note 242, at 581. McCormick believed that hearsay was one doctrinal area in which optimism was warranted. He approvingly cited the Massachusetts rule admitting hearsay declarations of persons deceased at the time of trial and saw a future in which the rule would be treated "in terms of discretion which needs only to be limited by some requirement of fair notice and to be guided by a general standard." McCormick, *supra* note 242, at 512.

<sup>248.</sup> See Morgan, supra note 243, at 587. In 1898, Thayer also quoted Greenleaf and then wrote: "I think that it would be juster and more exact to say that our law of evidence is a piece of illogical, but by no means irrational, patchwork, not at all to be admired, nor easily to be found intelligible, except as a product of the jury system . . . ." Thayer, supra note 241, at 72.

But there was hope on the horizon. If "a frontal attack on the entire field is foredoomed to failure at present," <sup>254</sup> a flank attack, lessening the "sporting features of a lawsuit," <sup>255</sup> was much more likely to succeed.

Nearly a decade after the decision in *Hoffman*, a Kansas City lawyer and Chairman of the Evidence Code Committee of the Missouri Bar, Charles L. Carr, discussed the proposed Missouri Code of Evidence. By this time, the Model Code of Evidence was a dead letter, killed by, among other causes, World War II, Wigmore's opposition, and professional resistance to "radical" reform. That resistance was due, in some part, to the Model Code's "radical reform" of hearsay was made clear in Carr's essay. Carr couched the proposed Missouri Evidence Code, also never enacted, as not embracing reform, much less radical reform, but as an effort to "clarif[y], condense[], and simplif[y]" the existing rules of evidence. The Model Code was "too radical for adoption as a whole in Missouri, and "[t]he most revolutionary part of the Model Code" was its work concerning hearsay. The hearsay rules proposed by the Model Code departed from (or ignored) experience, and left the administration of justice "without any real limitation or safeguard with regard to hearsay evidence."

Morgan's efforts to radically reform the rules of evidence failed, although two later, much less radical, efforts generated some reform.<sup>263</sup> Any momentum to radically reform hearsay, however, was lost. The Uniform Rules of Evidence were consciously less "radical" than the Model Code. According to its Committee Chairman, Spencer Gard, "Sensible change without shock is an underlying policy of the Rules. That is the reason

- 254. Morgan, supra note 243, at 599.
- 255. Morgan, supra note 243, at 605.
- 256. Charles L. Carr, *The Proposed Missouri Evidence Code*, 29 Tex. L. Rev. 627 (1951). This article originally was presented at the Benjamin Dudley Tarlton Institute on the Law of Evidence at the University of Texas on December 9, 1950.
- 257. See John Henry Wigmore, The American Law Institute Code of Evidence Rules: A Dissent, 28 A.B.A. J. 23 (1942).
- 258. See Report of Committee on Administration of Justice on Model Code of Evidence, 19 J. St. B. CALIF. 262 (1944) (rejecting Model Code because it was designed to "entirely revolutionize our present rules of evidence and to substitute for them the rules of evidence that are generally in force in continental Europe"). This resistance was also based, in part, on Morgan's controversial claim that, "A lawsuit is not a means of making a scientific investigation for the ascertainment of truth." Morgan, Code of Evidence, supra note 54, at 539. See Ariens, supra note 12, at 234-37, 242-45.
  - 259. Carr, supra note 256, at 635.
  - 260. Carr, supra note 256, at 641.
- 261. Carr, supra note 256, at 640. See also Carr, supra note 256, at 638 ("The most revolutionary feature of the Model Code is that it does away with the hearsay exclusion rule and its exceptions . . . without any real limitation.").
  - 262. Carr, supra note 256, at 640.
- 263. The Uniform Rules of Evidence, promulgated by the National Conference of Commissioners on Uniform State Laws in 1953, were adopted in four jurisdictions, Kansas, New Jersey, Utah and the Virgin Islands. The Federal Rules of Evidence, enacted by Congress and implemented in 1975, have been adapted by nearly forty states. On the background of both sets of rules, see Ariens, supra note 12, at 245-53.

why the Rules take a somewhat conservative approach to the problem of hearsay."<sup>264</sup> The Advisory Committee to the Federal Rules of Evidence also rejected any radical reform of the rules concerning hearsay. As for the 1898 Massachusetts law admitting the hearsay declarations of persons deceased at the time of trial, the Committee concluded that was "unconvinced of the wisdom of abandoning the traditional requirement of some particular assurance of credibility as a condition precedent to admitting the hearsay declaration of an unavailable declarant."<sup>265</sup> The modest goal of the Advisory Committee was to "encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future."<sup>266</sup> The result, depending on how you want to count, is between twenty-eight and thirty-seven "exceptions" to the rules on hearsay.<sup>267</sup>

Included as one of those exceptions was an exception for business records.<sup>268</sup> The Advisory Committee explicitly took issue with Frank's conclusion that the exception implicitly required the absence of a motive to misrepresent. It concluded that "absence of motive to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion."269 But the rule itself capitulated to the long extant fear of false evidence. As drafted and as enacted, the Rule permitted exclusion if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."<sup>270</sup> In the early twentieth century, Wigmore had tried to make the subject of hearsay cohere by "discover[ing] in each of the exceptions something which he calls a guaranty of trustworthiness," an effort Morgan believed disastrously wrong.<sup>271</sup> A circumstantial guarantee of trustworthiness amounted to "nothing more than a situation in which the ordinary person in making the declaration would usually desire to tell the truth or would have no motive to falsify."272 But the danger of insincerity was only one of three important hearsay dangers, and the least important. Most importantly, trustworthiness was not guaranteed simply because the declarant had no motive to falsify; determining trustworthiness required an assessment of the declarant's perception and memory, and Wigmore's unified theory of hearsay

<sup>264.</sup> Spencer Gard, The Uniform Rules of Evidence, 31 TULANE L. REV. 19, 23 (1956).

<sup>265.</sup> Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Rules of Evidence* for the United States District Courts and Magistrates, March 1969, 46 F.R.D. 161, 326 (1969) [hereinafter *Proposed Rules*]. The Committee was thus rejecting a proposal advocated at one time or another by John Appleton, James Bradley Thayer, John Henry Wigmore (in the Commonwealth Fund proposal), Eddie Morgan, John M. Maguire, and Charles T. McCormick.

<sup>266.</sup> Id. at 328.

<sup>267.</sup> There are twenty-four exceptions to the hearsay rule in Fed. R. Evid. 803 and five exceptions in Fed. R. Evid. 804. Because one exception is duplicated in Rules 803 and 804, one can count a minimum of twenty-eight exceptions. If you count, in addition to all of the exceptions in Rules 803 and 804, the "exceptions" (the Federal Rules simply define them as not hearsay) found in Fed. R. Evid. 801(d), you reach thirty-seven exceptions.

<sup>268.</sup> FED. R. EVID. 803(6).

<sup>269.</sup> Proposed Rules, supra note 265, at 360-61 (citation omitted).

<sup>270.</sup> Proposed Rules, supra note 265, at 346; FED. R. EVID. 803(6).

<sup>271.</sup> Morgan, Code of Evidence, supra note 54, at 694.

<sup>272.</sup> Morgan, Code of Evidence, supra note 54, at 694 (emphasis added).

exceptions failed by emphasizing the element of sincerity at the expense of perception and memory.<sup>273</sup> Morgan believed Wigmore's effort to find a guarantee of trustworthiness in each recognized exception to hearsay was undertaken in the fallacious belief that the cause for the rules of hearsay, and more generally, the exclusionary rules of evidence, was the existence of the jury.<sup>274</sup> For all its talk about the historical derivation of the rule, the Advisory Committee's inclusion in Rule 803(6) of the "trustworthiness" guarantee element accepted Frank's view that the jury could not be trusted to assess evidence in which there was some motive to falsify. Thus was reform strangled.

#### **CONCLUSION**

Thayer's desire for a "system of evidence simple, aiming straight at the substance of justice, not nice or refined in a its details, not too rigid, easily grasped and easily applied simple rules" is no closer to us than it was to lawyers practicing in Thayer's day. It may be that such rules are beyond the law of evidence, particularly in an age in which insights from economics, game theory, probability theory and communication theory are suggested for the reform of hearsay and other aspects of the law of evidence. We may do no better than Learned Hand: "The truth is that no rules in the end will help us." 276

To end as I began, I quote Judge Abruzzo, in his instructions to the jury in *Hoffman* v. *Palmer*. After summarizing the testimony of the parties, Abruzzo concluded: "Those are the stories, gentlemen. Both of them can't be true, can they? Either one of the stories must be true, and the other one not. It will become your duty to reconcile the testimony, to analyze it, and put your fingers on where the truth is."<sup>277</sup>

<sup>273.</sup> Morgan, Code of Evidence, supra note 54, at 694.

<sup>274.</sup> Morgan, Code of Evidence, supra note 54, at 694. See also Morgan, supra note 222; Edmund M. Morgan, The Hearsay Rule, 12 WASH. L. REV. 1, 1, 11-19 (1937).

<sup>275.</sup> THAYER, *supra* note 30, at 529. Both McCormick and Morgan also wished for simple, understandable rules of evidence. *See* McCormick, *supra* note 242, at 581 ("The final yield will be the acceptance by national and state courts of the task of embodying in rules of court a rational, simplified code of evidence."); Morgan, *supra* note 243, at 609 (suggesting the drafting of evidence rules like the "harmonious, simple and easy of application" rules of civil procedure).

<sup>276.</sup> Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 Lectures on Legal Topics 87, 104 (1926) (published address given on November 17, 1921, by Hand, then a United States District Judge).

<sup>277.</sup> Record, supra note 59, at 424.

# THE NEW WOMAN LAWYER AND THE CHALLENGE OF SEXUAL EQUALITY IN EARLY TWENTIETH-CENTURY AMERICA

### VIRGINIA G. DRACHMAN\*

In 1917, Denver lawyer Mary Lathrop became the first woman admitted into the American Bar Association; in 1930, she confessed that she was tired of the equality she had achieved in the legal profession. Moreover, she yearned for the feminine privileges women lawyers had received in the past. "Women have gained rights but they have lost privileges. They receive no more courtesy and chivalry. Personally, I'm rather tired of rights. I'd love to have a few privileges . . . . I advise any girl who contemplates entering laws to stay away from marriage and concentrate on the legal business." In one brief moment, Lathrop unveiled the sacrifices inherent to women lawyers' quest for professional equality with men. Moreover, she revealed that they had not even achieved their goal of sexual equality. As far as Lathrop was concerned, women lawyers still could not balance the dual responsibilities of marriage and career with the same ease as men. Rather, the only way for women to succeed in law in 1930 was to accept the same separation of marriage and career as nineteenth-century women lawyers had endured.

It had not always seemed so discouraging. Rather, the generation of the new woman lawyer began the twentieth century with great hope and optimism about the promise of sexual equality for women in the legal profession. And they had good reason. The new woman lawyer was part of a generation of women who did not have to face the rigid legal and institutional barriers that had obstructed women's entry into the legal profession in the nineteenth century. By 1920, every state bar was open to women, all but twenty-seven of 129 law schools admitted women, and the suffrage amendment made women full and equal citizens. As the sexual barriers crumbled, the number of women lawyers soared. Whereas there were only 200 women lawyers in 1880, by 1920 there were 1738. Moreover, another 1171 women were enrolled in law schools and would join the ranks of the 3385 women who were lawyers by 1930.<sup>2</sup>

Having been spared the struggles of nineteenth-century women lawyers to gain admittance to bar associations and law schools, women lawyers in the early twentieth century faced their future with optimism and self-confidence, believing in their ability to succeed in the legal profession. Embracing the new ideal of sexual equality, they relished competition with men and anticipated success on male terms in all areas of their professional lives. For one, they cast their sights beyond the office, the appropriate arena for the nineteenth-century woman lawyer, and claimed the courtroom as their rightful

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<sup>1.</sup> Bar Group Assails Rivals of Lawyers, N.Y. TIMES, Aug. 19, 1930, at 16 [hereinafter Bar Group].

<sup>2.</sup> RONALD CHESTER, UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA 8 (1985); CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 4 (1981).

domain. In doing so, they signalled an end to the sexual division of labor in legal practice. In addition, whereas nineteenth-century women lawyers had made a special claim to protect the legal rights of women and children, the generation of new women lawyers claimed the once male-identified areas of legal practice such as litigation, bankruptcy, and criminal law as well.<sup>3</sup>

The new women lawyers also brought sexual equality into their private lives. Rejecting the notion of a woman's so-called natural domesticity, they redefined marriage and motherhood as lifestyle options rather than womanly obligations. They insisted that the new woman lawyer who chose this route could confidently expect to balance the needs of her family with the obligations of her professional life.<sup>4</sup> In both their private and professional lives, new women lawyers sought to throw out the rules of the past and expected to play the game like men.

In the minds of these new women lawyers, their claim to sexual equality signalled the end of the deep conflict between femininity and professional identity. This conflict had plagued women lawyers in the nineteenth century, demanding that they be at once sentimental and objective, domestic and career-oriented. Instead, the new women lawyers of the 1910s and 1920s proudly proclaimed that the era of sexual equality had arrived, permitting them to shed the burden of their feminine identity.<sup>5</sup> One woman lawyer expressed the faith of her generation in the new sexual equality, explaining that "the day has arrived when there are only *lawyers*, and not *men* and *women* lawyers." Another woman echoed this view. "For my part, I want merely to be known as a 'lawyer' and not as a 'woman lawyer' . . . ."

While the generation of new women lawyers began the century believing in the promise of sexual equality for women in the legal profession, by the end of the 1920s they understood that their optimism had been misplaced. Despite the remarkable success of some individual women lawyers, most women lawyers never came close to achieving the professional prestige, autonomy, fulfillment, or financial security of women like Lathrop.

At the height of the era of optimism in the early twentieth century, the Bureau of Vocational Information sought to discover the reality of women lawyers' professional lives. The Bureau of Vocational Information (BVI) was an all-women's organization founded in New York City in 1919. Like the Equity Club, 8 a correspondence club for women lawyers in the 1880s, it was run by women to serve women's unique needs. At the same time, the BVI bore the stamp of the new generation of early twentieth-century

<sup>3.</sup> Virginia G. Drachman, Entering the Male Domain: Women Lawyers in the Courtroom in Modern American History, 77 MASS. L. REV. 44, 48 (1992).

<sup>4.</sup> See Virginia G. Drachman, "My 'Partner' in Law and Life": Marriage in the Lives of Women Lawyers in Late 19th- and Early 20th-Century America, 14 J. LAW & Soc. INQUIRY 221 (1989).

<sup>5.</sup> See generally Nancy F. Cott, The Grounding of Modern Feminism (1987); Rosalind Rosenberg, Beyond Separate Spheres: Intellectual Roots of Modern Feminism (1982).

<sup>6.</sup> Sane Suggestions, 14 WOMEN LAW. J. 9, 9 (1926).

<sup>7. 9</sup> WOMEN LAW. J. 6, 6 (1919).

<sup>8.</sup> See Virginia G. Drachman, Women Lawyers and the Origins of Professional Identity in America: The Letters of the Equity Club, 1887 to 1890 (1993); Virginia G. Drachman, Women Lawyers and the Quest for Professional Identity in Late Nineteenth-Century America, 88 Mich. L. Rev. 2414, 2415 (1990).

women. It eschewed the intimate, personal character of the Equity Club and embraced the modern idealization of objectivity and a science of society. In its search for "a body of authenticated facts," the BVI employed the empirical methods of the new social sciences. While the women of the Equity Club had spoken through personal letters, the BVI asked women to communicate through survey questionnaires so that statistically verifiable norms, rather than personal experiences, could be presented.

By 1920, women comprised almost half the student population on college campuses. The BVI believed it had a special mission to help these young educated women make reasonable choices after graduation. With an eye toward providing college-educated women with hard facts, the BVI gathered data on women in a wide range of vocations and professions, from agriculture to medicine, and provided their findings to educators and guidance counselors.

In 1920, the BVI turned its attention to the law as a profession for women and published its survey of women lawyers, *Women in the Law*. Prepared by Beatrice Doerschuk, Assistant Director of the BVI, *Women in the Law* provided the young woman lawyer-to-be with a range of information about her place in the legal profession, from her educational opportunities to her employment possibilities. To gather her data, Doerschuk compiled a list of approximately 1700 women who had either graduated from law school or had been admitted to a state bar. From this list, she sent questionnaires to 827 women, and she received 297 responses.<sup>10</sup> The majority of the women who answered the questionnaire (sixty-two percent) were practicing lawyers.<sup>11</sup> Most (fifty-two percent) were general practitioners while the remaining ten percent worked in law offices. The BVI survey revealed that most practicing women lawyers in 1920 moved in the legal world of small practitioners, just like most male attorneys.

At the same time, there was a considerable minority (thirty-eight percent) of women lawyers who did not practice law at all. In seeking to identify the range of opportunities for women in the law, the BVI inadvertently discovered the sobering fact that many women lawyers did not practice law. Instead, they worked in law-related vocations or in business, in positions typically filled by women such as social work, stenography, education, and librarianship. Yet, these non-practicing women lawyers still identified with the legal profession and defined themselves as lawyers even if they did not practice.

In several ways, the women in the BVI survey expressed the new woman's optimism regarding the prospects for women in the legal profession. For one, they were very

<sup>9.</sup> BEATRICE DOERSCHUK, WOMEN IN THE LAW: AN ANALYSIS OF TRAINING, PRACTICE AND SALARIED POSITIONS vii (1920); see also Bureau of Vocational Information 14 (1925) (on file in the Bureau of Vocational Information Collection [hereinafter referred to as BVI Collection without cross-reference] at the Arthur and Elizabeth Schlesinger Library on the History of Women in America [hereinafter referred to as Schlesinger Library without cross-reference], box 1, folder 2). On the rise of a science of society and its impact on American culture, see generally EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973).

<sup>10.</sup> DOERSCHUK, supra note 9, at 9.

<sup>11.</sup> These statistics as well as those discussed later in this essay are drawn from the author's quantitative analysis of the original questionnaires of practicing women lawyers gathered by the BVI. Unless otherwise stated, all statistical information in this essay is from the author's quantitative analysis of the questionnaires.

hopeful about the importance of suffrage in helping forward women's legal careers. As a political touchstone, suffrage had been the single-most powerful issue for women for nearly eighty years. The BVI, acutely aware of the importance of suffrage, sought to examine its practical impact. Nearly one-half of the BVI women believed that suffrage helped women in law while another six percent hoped it would. Eleven percent did not believe that suffrage would make a difference while twenty-five percent were unsure. Some among the optimistic majority focused on the intangible benefits of suffrage. They viewed the legal right to vote as an actual empowerment which enhanced women lawyers' status and respect. Others took a more practical view and tied suffrage to their desire to run for public office or to win appointments to positions in the courts.

Not all women were so optimistic about the benefits of the vote. Twenty-five percent were unsure about the impact of suffrage, while eleven percent did not believe that suffrage would help women in law. Women lawyers in the east and midwest, however, were more optimistic about the gains of suffrage than women in the south and west. Surprisingly, women in the south and west were four to five times as likely to say that suffrage was not a help to women in law. Women who went to law school after 1910, however, were twice as likely to ascribe significance to suffrage as were Victorian women.

Like suffrage, World War I was seen as another defining moment in women's lives, and most women lawyers viewed the impact of World War I with the same optimism as they viewed suffrage. Over one-half of the BVI women believed that the war had opened up new areas of work for women lawyers, providing them with opportunities which had not previously existed. Seventeen percent viewed women lawyers' positions as unchanged by the war, while only 2.3% said women lawyers had less opportunity with the war.

Despite the many claims about an era of great opportunity and professional progress for women in the law, women lawyers discovered that profound sexual discrimination still impeded their professional success. As early as 1912, Boston attorney Alice Parker Lesser exposed the hard reality behind the claims of progress. "I realize that for years I and other women lawyers have lied when we said that we were on an equal basis with men in our professions. It is not so, and I am going to tell the real truth about the situation now. The field of law is no better today for girls than it was 20 years ago when they entered it." Women had more opportunities than ever before to study law, she explained, but they still lacked the opportunity to practice it. "Of course, she has all the book learning any lawyer can have. . . . But practice of law tells another tale." 12

In 1920, in the midst of the heady days of the suffrage success and the claims of feminist victory, many women lawyers acknowledged that they were losing the battle to make it in the law. In 1920, New York lawyer Anna Parrons complained to the BVI that women had no opportunities for lucrative corporate work. "The big corporations will never give their work to women, and unless one can get big business the chances of financial success are small." But while some women lawyers deplored the dearth of

<sup>12. &</sup>quot;Girl Lawyer has Small Chance for Success," Says Mrs. Lesser, BOSTON SATURDAY EVENING TRAVELLER, June 8, 1912, at 2.

<sup>13.</sup> BVI questionnaire no. 18 (March 2, 1920) (on file in the BVI Collection at the Schlesinger Library) [hereinafter referred to as "BVI questionnaire" without cross-reference].

opportunities for women in the elite corporate law firms, others lamented an even more serious problem—the near impossibility of finding even a modest clerkship or office position. One woman lawyer claimed that male lawyers in New York City only hired women "if they haven't the money to pay a man."<sup>14</sup>

This was precisely the experience of Anna Moscowitz Kross, a Jewish immigrant from Russia and a graduate of New York University Law School. Law firms continually rejected her with the brazen claim, "We want a man." She finally found work in the office of a friend where she gained experience but earned no money. Gertrude Smith, another graduate of New York University Law School, encountered the same hostility in her search for a clerkship. In a letter to lawyer Inez Milholland, Smith explained that she had answered every ad for a legal position and was willing to accept a small weekly salary of only five dollars to cover the costs of cabfare and lunch. But despite her law degree from New York University and her desperate willingness to accept any position, she was always turned down. "They inform me very politely that I must not forget I am a woman and therefore would not be of any service to them." With little money to spare and no prospect of work in sight, she asked: "My dear Miss Milholland, are there no men in this city [who] have enough to give a woman lawyer a chance to show her worth . . . ?" Nearly broken by the relentless discrimination she encountered from male lawyers in New York, Smith confessed to Milholland: "I have lost all my ambition and courage."

The sexual discrimination Smith encountered was not unique to New York City. In Chicago, Irene Hanks reported that she had "been denied openings on the sole objection of sex." Alice Greenacre explained that not only had she failed to find a clerkship in Chicago, but other women lawyers had informed her that "no woman had ever had a law clerkship in a law office in Chicago." In addition to facing discrimination in their search for employment in Chicago, one woman lawyer reported that the Chicago Bar Association was "not cordial in its treatment of its women members."

Women lawyers endured the same prejudice and hardships in other cities throughout the country. N. L. Riley of Tacoma, Washington echoed Parson's complaint that corporate law positions were closed to women, and that they only found opportunities in the "least remunerative branches" of law. Bertha Green of Mountain Home, Idaho reported that in her "part of the country a woman can hardly get a position in a law office, as 'there ain't no sich animile." Elizabeth Parsons reported an even bleaker situation in Omaha, Nebraska. "[I]n this city the legal firms won't have a woman lawyer around except in the capacity of stenographer or clerk." As a result, four or five women tried to set up law practices in Omaha, but all of them gave up because they could not make a

<sup>14.</sup> BVI questionnaire no. 131 (March 27, 1920).

<sup>15. 70,000</sup> Work People Clients for Woman, N. Y. TIMES, July 22, 1923, at 7.

<sup>16.</sup> Letter from Gertrude Smith to Inez Milholland (no date available) (on file in the Inez Milholland Papers at the Schlesinger Library, reel 2, folder 21).

<sup>17.</sup> BVI questionnaire no. 200.

<sup>18.</sup> BVI questionnaire no. 146 (March 7, 1920).

<sup>19.</sup> BVI questionnaire no. 199 (April 6, 1920).

<sup>20.</sup> BVI questionnaire no. 239 (March 13, 1920).

<sup>21.</sup> BVI questionnaire no. 95 (March 11, 1918).

<sup>22.</sup> BVI questionnaire no. 253 (April 22, 1920).

living. The State of Nebraska was no more hospitable to women lawyers than the city of Omaha. Of thirty-three women who had successfully passed the Nebraska bar, only Parsons and one other woman were in active practice.<sup>23</sup>

Women lawyers in the South encountered particularly strong resistance. Tiera Farrow could not find one male attorney in Kansas City, Missouri to hire her. As a result, she and another woman lawyer had to open an office together at a greater financial expense than either could afford. Their office was a very modest venture; they shared one room with two desks, four chairs, a bookcase of law books and a typewriter. Despite their efforts to economize, business was so meager that survival forced both women to find other jobs. They were insulted or ignored by male lawyers and judges, and after two years of working together, they had made no money. Farrow's partner became so discouraged that she quit the law and went to New York to become a secretary. On her own, Farrow moved to an even smaller office, tried to live even more modestly, and settled into a solo practice which barely allowed her to make ends meet.<sup>24</sup>

In Baltimore, the city bar association refused to admit women as late as 1931. This policy effectively locked the women lawyers of Baltimore out of both the Maryland state bar and the American Bar Association because both associations required its members to belong to their local bar association.<sup>25</sup>

The situation for women lawyers in Georgia was even worse because the Georgia bar did not open to women until 1916 and then only after a bitter struggle. The debate began in 1911 when Minnie Anderson Hale, a graduate of the Atlanta Law School, applied for, but was denied, admission to the bar. Several weeks later, the Georgia legislature defeated a bill which would have made women eligible for the bar; but, it could not escape the issue. The following year, Georgia McIntire-Weaver, a one-time dressmaker, stenographer, and finally honors graduate of Atlanta Law School, forced the Georgia legislature to reconsider reforming the law, which prohibited women's admission to the bar. Despite the support of eminent male attorneys and judges, the legislature again refused to pass the reform. However, even the Georgia legislature could not stop Georgia McIntire-Weaver. She relocated to West Virginia, which had admitted women lawyers since 1896, passed the bar, and set up practice. Having passed the bar in another state, McIntire-Weaver was finally eligible to return to Georgia to practice.

The situation in Georgia was closely monitored by the press, including professional journals such as Law Notes and Women Lawyers' Journal as well as the popular women's magazine, Good Housekeeping. In its article, Your Daughter's Career, Good Housekeeping used the example of Weaver-McIntire in Georgia to warn its female readership of the obstacles awaiting the aspiring woman lawyer.<sup>29</sup> In 1916, the Supreme

<sup>23.</sup> Id.

<sup>24.</sup> TIERA FARROW, LAWYER IN PETTICOATS 61-66, 75-77 (1953).

<sup>25.</sup> Henrietta Dunlop Stonestreet, *Women Lawyers vs. The Baltimore Bar Association*, 19 WOMEN LAW. J. 18, 18-19 (1931).

<sup>26.</sup> See Women Lawyers vel non in Georgia, 15 LAW NOTES 84 (1911).

<sup>27.</sup> Women Lawyers in Georgia? Not Yet, 15 LAW NOTES 102 (1911); Georgia Legislators Set Back the Clock of Progress, 1 WOMEN LAW. J. 17 (1911).

<sup>28. 2</sup> WOMEN LAW. J. 66 (1913).

<sup>29.</sup> Rose Young, Your Daughter's Career, 61 GOOD HOUSEKEEPING 470 (1915); see also 2

Court of Georgia once again denied women admission to the bar;<sup>30</sup> but, this was the last time. Within months, the Georgia legislature passed an act to permit women to practice law; and, on August 19, 1916, Georgia joined the ranks of the other forty-five states or territories that had already admitted women to the bar on equal terms with men.<sup>31</sup>

Two women lawyers, Mary Johnson and Betty Reynolds Cobb, immediately gained admission to the Georgia bar in 1916. Nevertheless, women lawyers in Georgia still faced an uphill fight. There were only twenty-five of them in the entire state by 1920. Compared to states such as Massachusetts with over 100 women lawyers and California with almost 350, the women lawyers of Georgia were a very small and insignificant group. Representing barely one percent of the practicing attorneys in the state, they made their careers alone under conditions strikingly similar to the pioneer generation of women lawyers a half century before. Cobb admitted that, even though she had what she described as a "pleasant and reasonably remunerative" office practice, Georgia was still reticent to welcome women lawyers.<sup>32</sup> "I do not think our section of the country is ready, quite yet, to make 'easy sailing' for a woman lawyer."33 Moreover, Cobb linked what she perceived to be the deep hostility against women lawyers in Georgia to the women's suffrage movement and the advancement of women in general. In a blunt warning to women not to try to establish a legal career in the south, she explained: "To put it in a nutshell, I would not advise any young woman to study law with a view to practicing it below the 'Mason and Dixon Line' for the next generation at least. We haven't the vote yet; and if we ever get it, it will be when it is forced upon our law makers by a Federal Amendment and will not come as a State Law. Can I say anything more illuminating on the attitude of our men toward women?"34

While the situation for women lawyers may have been unusually harsh in Georgia, it was not unique. The difficulties encountered by women lawyers in New York, Chicago, Baltimore, Nebraska, and Washington indicate the existence of a national pattern of discrimination against women in the legal profession. Frances R. Calloway, Office Manager and Registrar at DePaul University Law School in Chicago, attested to the pervasiveness of this sexual discrimination. "Out of hundreds of requests for law clerks . . . I have never received one request for a young woman, nor have I been able to place one unless through influence, as the daughter of a lawyer."<sup>35</sup>

African-American women suffered even deeper discrimination as race combined with sex to yield tougher obstacles to overcome. While a few were able to overcome the hardships of economic struggle and racism to make it in the legal profession, for the most part, black women who became lawyers were part of the privileged elite in the African-

WOMEN LAW. J. 66 (1913); Woman Lawyer Follows up Case, 3 WOMEN LAW. J. 29 (1914).

<sup>30.</sup> Ex parte Hale, 89 S.E. 216, 217 (1916).

<sup>31.</sup> ACTS AND RESOLUTIONS OF GENERAL ASSEMBLY OF STATE OF GEORGIA No. 471 (Aug. 19, 1916).

<sup>32.</sup> Letter from Betty Reynolds Cobb to Emma P. Hirth (April 9, 1920) (BVI Collection, box 9, folder 142) [hereinafter Cobb]. On the numbers of women lawyers in Georgia, see IV UNITED STATES BUREAU OF THE CENSUS, THE FOURTEENTH CENSUS OF THE UNITED STATES 70-71 (1920).

<sup>33.</sup> Cobb, supra note 32.

<sup>34.</sup> Cobb, supra note 32.

<sup>35.</sup> BVI questionnaire no. 251 (March 1, 1920).

American community.<sup>36</sup> Jane Bolin grew up in the middle class town of Poughkeepsie, New York, went to Wellesley College and then to Yale Law School, and married a lawyer.<sup>37</sup> Sadie Mossell Alexander's father was the first African-American to graduate from the University of Pennsylvania Law School, and her husband was a graduate of Harvard Law School.<sup>38</sup> Inez Fields of Hampton, Virginia was the daughter of a lawyer and the wife of a professor of industrial education.<sup>39</sup> Sallie White of Kentucky was the wife of the dean of faculty at the Central Law School, the so-called "colored" state university in Kentucky.<sup>40</sup>

The economic comfort, social status, and professional advantages they derived from the men in their lives, either their fathers or husbands, linked these women. For women such as Alexander, White, and Bolin, marriage to a lawyer eased their way into the legal profession and moderated the dual handicaps of their sex and race. Yet, even these most privileged of African-American women faced obstacles white women lawyers never new. Racial discrimination was a harsh reality that left women like Sadie Alexander with little patience for the problems of white women lawyers. "When I hear white women lawyers complaining about their lot it amuses me. It is the same problem I have been facing all my life."

In the end, no degree of social privilege could fully shelter an African-American woman lawyer from the dual prejudices of racism and sexism. The paltry number of African-American women lawyers testifies to that fact. While three black women lawyers practiced law in Virginia in the 1920s, they remained the only African-American women to practice law there until after World War II.<sup>42</sup> Black women lawyers fared even worse in other southern states. None practiced law in Mississippi, Louisiana, Kentucky, or Arkansas before 1945.<sup>43</sup> Nor did they do much better in other regions of the country. There were only four African-American women lawyers in the District of Columbia, three in New York and none in Massachusetts in 1930.<sup>44</sup> By 1940, there were only thirty-nine African-American women lawyers scattered throughout the country. These thirty-nine black women lawyers stood in stark contrast to the 4146 white women lawyers in the country in 1940. And, these white women lawyers were still but a small group when compared with the 172,329 white male lawyers in 1940.<sup>45</sup>

<sup>36.</sup> On African-American women lawyers, see NOTABLE BLACK AMERICAN WOMEN (Jessie Caney Smith ed., 1971); J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944 (1993) [hereinafter EMANCIPATION]; Lady Lawyers, EBONY 18 (August 1947) [hereinafter Lady Lawyers]; NEGRO WOMEN IN THE JUDICIARY (Alpha Kappa Alpha Sorority, Inc. Heritage Series no. 1, 1968).

<sup>37.</sup> WOMEN LAWYERS IN THE UNITED STATES 56-57 (Dorothy Thomas ed., 1957); NEGRO WOMEN IN THE JUDICIARY, *supra* note 36, at 5.

<sup>38.</sup> NOTABLE BLACK AMERICAN WOMEN, supra note 36, at 5-6.

<sup>39.</sup> WOMEN LAWYERS IN THE UNITED STATES, supra note 37, at 191.

<sup>40.</sup> Women Lawyers, 35 WOMAN'S J. 153 (May 14, 1904).

<sup>41.</sup> Lady Lawyers, supra note 36, at 19.

<sup>42.</sup> Peter Wallenstein, "These New and Strange Beings": Women in the Legal Profession in Virginia, 1890-1990, 101 VA. MAG. HIST. AND BIOGRAPHY, Apr. 1993, at 193, 211.

<sup>43.</sup> EMANCIPATION, *supra* note 36, at 300-03, 331, 351-52.

<sup>44.</sup> EMANCIPATION, supra note 36, at 632.

<sup>45.</sup> By 1940, the thirty-nine African-American women lawyers were scattered around the country as

Overall, the total number of women lawyers in the era of the new woman ranged from 558 or 1.1% of the legal profession in 1910, to 1738 or 1.4% in 1920, to 3385 or 2.1% in 1930. The bleakness of the situation did not escape the women lawyers surveyed by the BVI. At least two-thirds thought that sexual discrimination in some form was the single most important limitation to a law career for women. Some said men received the best jobs, others said the profession was overcrowded with men, while still others said it was hard and lonely to be a pioneer in a profession run by men.

Another group, about one-fourth of the BVI women, linked gender concerns with the economics of law practice. Some found that, as women, it was hard for them to attract clients. Others believed that women had a harder time than men getting started in their careers. Still others lamented the timeless women's complaint that they did not have the uninterrupted time required to establish and maintain a career in law. For these women, sexual discrimination and economic limitations overlapped.

A few women in the BVI survey saw the law differently. Identifying a range of problems which transcended women's issues, they defined the legal profession as dry, undignified, unstimulating, or too difficult. But these women were in the minority. Most felt that any limitations on a law career were directly related to women's secondary status. In fact, the BVI found that women overwhelmingly (seventy-three percent) believed that men had a better chance to succeed in law than women. Nine percent were more hopeful, arguing that women's chances in law were increasing. Seven percent said that it was up to the individual woman to make her own way, while some twelve percent actually believed that women had an equal chance with men in the legal profession.

For most of the BVI women, however, sexual discrimination was their major obstacle. While they sought professional and personal empowerment through a career in law, most of them understood the stark reality that prejudice against women prevented them from succeeding as equals with men. A few (twenty-four out of 112) perceived the problem in more structural terms, pointing to the fact that women were so new and so few in the profession that they could not yet hope to be equal with men. While these women envisioned a future of sexual equality in the legal profession, they shared with the majority of BVI women the understanding that sexual discrimination still prevailed.

Sexual discrimination not only limited women's chances in the legal profession, but, according to sixteen percent of the BVI women, it was the main reason why many women lawyers were not in practice at all. Yet, twice as many women (thirty-four percent) pointed to the problems of women's personal lives, explaining that the demands of marriage and motherhood and concerns about women's health kept women from practicing law. Sexual discrimination in the public arena and the problems women confronted in the private sphere were linked because they both reflected distinctly women's concerns. Taken together, women's concerns were cited by one-half the BVI women as the reason women lawyers were not practicing. Not all BVI women saw the problem in terms of gender, however. Some (twenty-eight percent) saw it as an economic

follows: ten in New York, eight in Illinois, three each in California and Virginia, two each in Indiana, Michigan, Ohio and Pennsylvania, and only one in Alabama, the District of Columbia, Florida, Iowa, Massachusetts, Minnesota, and Texas. There were no African-American women lawyers in thirty-four states. EMANCIPATION, supra note 36, at 635-36.

<sup>46.</sup> EPSTEIN, supra note 2, at 4.

issue, explaining that many women found it impossible to succeed financially in the law. Yet, this too, may be related to prejudice against women lawyers. Others (sixteen percent) believed that women lawyers did not practice because they simply were not interested.

While many women lawyers did not practice, for those who did, the task of finding a job was not easy. Sexual discrimination confronted them at every turn. The new corporate law firms were havens of elite white male lawyers. And, the courtroom continued to be viewed as the arena of legal combat, inappropriate for the woman lawyer. Some women lawyers admitted that litigation was a physical and emotional strain on many women. Competing against men who had experience in the courtroom placed them at an undue disadvantage. "[I]t takes years of practice and familiarity with court routine to acquire the ease of manner and sureness of action that the man lawyer seems to have naturally in the court-room," explained one woman lawyer in 1920.<sup>47</sup> In fact, most women lawyers in the 1910s and '20s who found jobs worked in offices. Despite the optimistic claims women lawyers made about the golden age of opportunity for women in the legal profession, litigation and courtroom work remained as closed to the modern woman lawyer of the 1910s as they were to the Victorian woman lawyer a generation before, while the new field of corporate law emerged as a bastion of the most elite of male lawyers only.

In fact, by 1920 the late nineteenth-century patterns of discrimination against women lawyers in the courtroom were reinforced rather than altered. Only eight percent of women lawyers specialized in trial work, including litigation, criminal law, federal practice and bankruptcy. Women lawyers understood that their best opportunities were not in litigation but in office practice. In their quest for independence and power, they followed the trend toward professional specialization, but found their professional opportunities outside of the courtroom and apart from elite corporate and financial institutions. While most of the BVI women had general office practices (fifty-six percent), the leading specialty among the BVI women was probate law (thirty-six percent). In sharp succession were domestic relations (thirteen percent), general practice (eleven percent), and real estate (ten percent). Solidly in place by 1920, these patterns of practice for women lawyers remained unchanged for the next fifty years.<sup>48</sup>

On the other hand, the BVI women broke the feminine stereotype in that few saw opportunities in the "helping" side of law, such as social welfare, juvenile work, or legal aid. However, they did not totally reject the notion of helping through the law. Rather, they redirected it from public law to probate practice. Probate law, domestic relations, general practice, and real estate shared an important feature: each represented the legal side of the caring quality in women. Women lawyers envisioned themselves employing their feminine strengths by acting as counselors of law, negotiators, mediators, and drafters of documents for the family.

While many women lawyers in the 1910s and '20s joined the chorus of women hailing sexual equality in the public arena, most actually built their professional lives on the old, familiar refrain of sexual differences. At the same time that women lawyers

<sup>47.</sup> BVI questionnaire no. 81 (April 16, 1920); see also BVI questionnaire no. 150 (March 1, 1920).

<sup>48.</sup> See generally EPSTEIN, supra note 2.

argued that each woman's individual temperament determined her own unique approach to the law, they also argued precisely the opposite—that women lawyers, as a group, often approached the law differently from men.<sup>49</sup> In deliberately emphasizing what one woman lawyer termed "the eternal feminine," women lawyers in the 1910s and '20s contradicted their very claims to sexual equality in the legal profession.<sup>50</sup> But, most women lawyers of the era understood all too well that despite the budding signs of sexual equality in society, women still suffered enormous discrimination in the legal profession. As a result, they believed that their femininity, not their equal potential with men, was their key to professional success. When asked what qualities a woman needed to succeed in law, one woman lawyer in 1920 gave the following advice: "[C]ultivate and maintain a woman's natural sweetness and femininity. It helps not only to secure clients but to hold them."<sup>51</sup> Male lawyers, when they were sympathetic to women lawyers, typically echoed these views. "Do not let yourself become unfeminine," warned one male lawyer in a speech to women lawyers in 1918. "If you do, then much of your power and usefulness in your chosen profession will have departed."<sup>52</sup>

Like the Victorian women lawyers who thrived on their sexual differences from men, modern women lawyers understood that they could use their femininity to claim their niche in the legal profession. Some women lawyers believed that they could serve male and female clients equally. Yet, most expressed the more traditional view that they, rather than men, were especially suited to women clients because women would find it easier to discuss personal legal matters with them rather than with men. In fact, almost thirty percent of the BVI women developed practices that were comprised of at least sixty percent women clients. Another thirty percent had practices which were forty to fifty-nine percent women, while another forty percent had practices of less than thirty-nine percent women. The experiences of the BVI women practitioners reveal that women clients were, indeed, an important element for many of them. However, while many relied heavily on women clients, others did not.

Women lawyers emphasized the virtues of their femininity in other ways as well. They argued that their "flair for detail" made them valuable partners in male law firms. "In my opinion," explained one woman lawyer, "the ideal firm of attorneys is one consisting of both men and women working as a complement to each other." Expressing the optimism of many women lawyers of her day, she predicted that sexually integrated law firms would be "quite universal in the next decade." 54

At the same time that women lawyers relied on their unique womanly qualities to serve their own professional interests, they also argued that, because of their feminine

<sup>49.</sup> DOERSCHUK, supra note 9, at 48.

<sup>50.</sup> Bessie Isabel Giles, The "Eternal Feminine," 2 WOMEN LAW. J. 54 (1912).

<sup>51.</sup> BVI questionnaire no. 191 (April 24, 1920); see also A Truer Perspective?, 4 WOMEN LAW. J. 47 (1915); Young, supra note 29.

<sup>52.</sup> Address of Hon. John M. Patterson, Associate Judge of the Court of Common Pleas, No. 1 of the County of Philadelphia, Made on the Occasion of the First Meeting of the Portia Club, 7 WOMEN LAW. J. 49, 64 (1918).

<sup>53.</sup> Vere Radir-Norton, The Practice of Law from the Viewpoint of a Woman Lawyer, 1 PHI DELTA DELTA 14, 15 (1923).

<sup>54.</sup> *Id*.

virtues, the legal profession would benefit from their very presence. Echoing the themes of a generation before, they claimed that their womanly sympathies, morality, and domestic nature would complement the competitive and aggressive qualities men brought to the law. Women would uplift the profession, preserve the humane point of view, and protect the legal needs of women and children. Moreover, women lawyers would replace the combative approach of men with their own conciliatory style. While male lawyers often chose the more aggressive tactic of arguing their cases in court, women lawyers typically preferred to prevent litigation by solving cases in their office. Employing a medical metaphor which revealed a similar sexual division of labor in medicine, one woman lawyer explained that women lawyers were especially skilled at "the social hygiene of law as opposed to legal surgery." 55

By the early twentieth century, women lawyers' emphasis on conciliation rather than confrontation had gained greater respect throughout the legal profession. The catalyst for this new view was the growth of corporations and trusts which brought the legal profession into closer relations with business in the last quarter of the nineteenth century and the first quarter of the twentieth. By the turn of the century, business law had emerged as a specialty dominated almost exclusively by wealthy and powerful male lawyers. At the same time, it thrived on the restraint and mediation skills women tended to bring to the law. In an article defending women's place in the legal profession, William P. Rogers of Indiana University School of Law pointed out the advantages of the womanly approach of compromise and conciliation to his male colleagues.<sup>56</sup> Specifically, he advised them to reject their contentious, flamboyant approach, to adopt a more moderate and even-tempered style, and to rely on negotiation and compromise in the law office rather than expensive court battles:

[T]he business world is seeking more and more to steer clear of [the jury lawyer's] domain by consulting in advance his less pretentious but more valuable associate. The shrewd business man knows of how much more worth it is to be kept out of a law suit than to win one. The aim of the true lawyer is not and should not be to promote litigation. To the contrary, it should be to avoid it.<sup>57</sup>

At the same time that some men lawyers began to question the value of combativeness in law practice, some women lawyers sought to distance themselves even further from the male model of success. In striking contrast to the view that financial success was the route to professional equality with men, many women lawyers seized upon the notion of female differences. They took it beyond the usual claim that women would complement men in the legal profession, however, making the more radical assertion that it was up to women lawyers to sharpen their differences with men and to mount a crusade to reform the legal profession.

Jessie Ashley issued this challenge to women lawyers in an essay in the *Women Lawyers' Journal* in 1912.<sup>58</sup> Born into a wealthy family, Ashley rejected the privileges

<sup>55.</sup> Zora Putnam Wilkins, Portias Undisguised, 9 WOMAN CITIZEN 14, 15 (1924).

<sup>56.</sup> William P. Rogers, Is Law a Field for Woman's Work?, 24 A.B.A. REP. 548, 552 (1901).

<sup>57.</sup> Id.

<sup>58.</sup> Jessie Ashley, Shall We Reverence the Law?, 2 WOMEN LAW. J. 37 (1912).

of her social class and dedicated her life to social revolution. She studied law at New York University, where her brother, Clarence Ashley, was dean and a strong advocate of women's legal education. After graduating, Ashley became involved in socialism and dedicated herself to a range of reforms including suffrage, birth control, the labor movement, and the legal rights of women. In 1912, she turned her attention to the ways in which women lawyers could contribute to her social revolution.<sup>59</sup>

In her essay, Ashley launched a bitter critique of women's efforts to pursue equality in the legal profession by blindly following the lead of men. "With pathetic eagerness to conform to all traditions and to be like men lawyers they bow to custom, conform to theory and go on uncomplaining in their brother's footsteps . . . ."60 Sexual equality on male terms, according to Ashley, demanded that women lawyers passively accept a legal system which protected property before people. Ashley called on women lawyers to reject equality on male lawyers' terms and to resurrect the traditional commitment of women to reform in an all-out attempt to redefine the values and goals of the American legal system. 61

This was a bold call, but Ashley was no blind idealist. She recognized the enormity of her request and understood that most women, as much as they might wish to reform the law, were engaged in a professional struggle simply to survive. As a result, they were in no position to take up her challenge. To do so, she acknowledged, "would lead to professional suicide. It is hard enough for women lawyers to earn their bread in practice of the law under the most favorable conditions, and to be known as 'crank' lawyers seeking to 'reform the world' would make starvation certain." Torn between their ideals on the one hand and their desire for professional acceptance on the other, women lawyers, according to Ashley, were tormented by the question, "Shall we reverence the law?"

Several years later, another New York lawyer, Elinor Byrns, echoed Ashley's themes. In an essay in the *New Republic* entitled *The Woman Lawyer*, Burns elaborated on the problems women lawyers faced when they took up Ashley's torch and rejected the terms of male-defined success in the legal profession.<sup>64</sup> Byrns identified three groups of women lawyers in the 1910s.

The first group were male-identified and had achieved sexual equality in the legal profession by emulating men. "Their creed is that by proving their ability to do, in the same way that men do, some of the things men lawyers are doing, they will establish their fitness for the practice of law and will gradually be given greater opportunities." 65

<sup>59.</sup> See A.C.B., Jessie Ashley, N.Y. CALL (no page nor date available (probably 1919)) (on file in the Mary Ware Dennett Papers at the Schlesinger Library, box 2, folder 30 [hereinafter Dennett Papers]); Friends Pay Tribute to Miss Ashley's Memory, N.Y. CALL (no page nor date available (probably 1919)) (on file in the Dennett Papers, box 2, folder 30); Jessie Ashley a Victim of Pneumonia, N.Y. CALL, Jan. 21, 1919 (on file in the Dennett Papers, box 2, folder 30).

<sup>60.</sup> Ashley, supra note 58, at 37.

<sup>61.</sup> Ashley, supra note 58, at 37.

<sup>62.</sup> Ashley, supra note 58, at 37.

<sup>63.</sup> Ashley, *supra* note 58, at 37.

<sup>64.</sup> Elinor Byrns, The Woman Lawyer, Jan. 8, 1916 New Republic 246, 246 (1916).

<sup>65.</sup> *Id.* 

The second group of women lawyers had become disillusioned by the gap between their personal ideals and the actual practice of the law. As a result, they had "dropped out" of the legal profession to become active in social reform where they could put their principles into action. <sup>66</sup>

The third group of women lawyers wished to stay in the law, but rejected the male model of success. "[T]hey do not want success if it means they must do what the successful men lawyers are doing," Byrns wrote.<sup>67</sup> Like Ashley, Byrns accused male lawyers of allying with the "rich and powerful" in a relationship where male lawyers and big business colluded to protect property and profit at the expense of human welfare.<sup>68</sup> It was the role of male lawyers in this relationship to find ways to circumvent the law whenever it threatened to impede the interests of big business.<sup>69</sup>

Byrns developed her perspective on corporate law first-hand while she worked in one of the elite corporate law firms in New York City. Over the course of her two years as a file clerk, she evolved from a young lawyer aspiring to be as good as the men in the office to their sharpest critic, accusing them of using their "knowledge of the law . . . to help big business." In a piercing attack, she charged that the firm's prestige and power came from its ability to protect the "dignity and security" of its clients as it helped them "conduct their business as they pleased." Disgusted with these policies, Byrns left the law firm and established her own solo practice. Rejecting the men who turned law into what she called a "game" for the rich and powerful, she redirected her efforts towards the needs of the community. The same community of the community.

Byrns called on other women lawyers to join her crusade to transform the practice of the law. But she understood all too well the conservative position which entrapped most women seeking to make their livelihood in the law. The only hope for change lay among a few "revolutionists at heart," that is, those women lawyers who were part of the women's movement. "The suffrage campaign and our struggles for feminism have developed our fighting spirit," she explained.<sup>73</sup> But even with the backing of a vibrant women's movement, Byrns remained bewildered about how she and other women lawyers could effect social revolution. Unable to offer a plan of action, she acknowledged the dilemma of her position. Echoing Ashley's query, "Shall we reverence the law?," she could do no more than pose the haunting question: "What are we to do?"<sup>74</sup>

A minority of privileged women lawyers had the financial resources to devote their public lives to the causes of women and the poor. Others found their answers to Byrns's and Ashley's questions in the women's legal institutions and the social welfare institutions of the progressive era, which reinvigorated and redirected the nineteenth-century women lawyers' movement for the early twentieth century. Institutions such as legal aid

<sup>66.</sup> Id.

<sup>67.</sup> Id.

<sup>68.</sup> *Id*.

<sup>69.</sup> *Id*.

<sup>70.</sup> Id. at 247.

<sup>71.</sup> *Id*.

<sup>72.</sup> *Id*.

<sup>73.</sup> *Id*.

<sup>74.</sup> *Id*.

societies, women's courts, and children's courts were the product of the combined efforts of feminists, male social reformers, and liberal male lawyers who wished to make the law accessible to the needs of the poor and dependent.

Moreover, these institutions brought professionalism and reform together by paying lawyers to protect those without the means to protect themselves. As a result, these institutions changed the terms of the long-standing debate over the place of philanthropy and reform in women lawyers' professional lives. Women lawyers in the 1880s had divided sharply over the issue, with some insisting that women lawyers should not permit charity and politics to interfere with their private practice, while others chose to devote their professional lives to social reform. Women lawyers in this generation who participated in the new legal welfare institutions no longer had to choose between law practice and reform because their work embraced both.

The new institutions of legal reform were an answer to Ashley's and Byrns's calls for action, providing women lawyers with a way to earn their livelihood in the maledominated profession of law while they devoted their careers to the traditionally feminine task of helping others. Whereas women lawyers in the 1880s often defended their efforts on behalf of the needy, women lawyers in the 1910s could proudly claim that their work for the poor and dependent placed them in the vanguard of the scientific reform of society. "Everywhere the women lawyers are serving the public not through amateurish and sentimental meddling, but through planned application of trained intelligence to social problems," reported one woman. Anna Moscowitz Kross, a labor lawyer in New York City and a long-time advocate of women judges, expressed a similar view in calling for women judges in special night courts for women. Women lawyers, she argued, would bring both "sympathetic hearts" and a "scientific system" to the sensitive problem of prostitution.

In their new positions of legal authority, women lawyers helped to reform the judicial system so that it would be more responsive to the needs of women. Tiera Farrow used her position as municipal court judge in Kansas City to redirect the focus away from the prostitutes who came to her court and onto the men who patronized them.<sup>78</sup> "The law is directed solely against you women," she told prostitutes in her court; and, she instructed police officers to arrest the men who sought the services of prostitutes as well as the women themselves.<sup>79</sup>

Women lawyers found their first significant professional opportunities to penetrate the court system through the juvenile courts founded at the height of progressivism and feminism in the first decade of the twentieth century. The rise of the juvenile courts was the direct result of an alliance between feminists and liberal male attorneys. The nation's first juvenile court, which opened in Chicago in 1899, represented the joint efforts of Jane Addams and Julia Lathrop of Hull House, the Chicago Woman's Club, and the Chicago Bar Association. Appalled by what they saw as an unjust penal system which treated

<sup>75.</sup> Wilkins, supra note 55, at 25.

<sup>76.</sup> Anna Moscowitz, The Night Court for Women in New York City, 5 WOMEN LAW. J. 9, 9 (1915).

<sup>77.</sup> Id.

<sup>78.</sup> FARROW, supra note 24, at 170.

<sup>79.</sup> FARROW, *supra* note 24, at 170.

juvenile offenders as adults by incarcerating them with adults and subjecting them to the same sentences, women activists and male liberals in the legal establishment joined forces to create a separate court system for young offenders in cities throughout the country including New York, Los Angeles, St. Louis, and Memphis. The creation of a juvenile court system institutionalized into the American courts the principle of state protection of children, which was at the core of early twentieth-century protective labor legislation.<sup>80</sup>

At the heart of the juvenile court system was the notion that child offenders needed an alternative system of justice that would guarantee them special attention and protections not given to adults. Rather than the cold, severe environment of the adult courtroom, the ideal juvenile court was modelled after the home. When a young girl entered the juvenile courtroom in Los Angeles, she saw "pictures on the walls, curtains, not bars, at the windows; and a big vase of roses, fresh from the garden." And rather than the harsh punishments meted out by male judges, children in the juvenile courts encountered women lawyers who gave them the firm but gentle direction best given by a mother at home. In the juvenile courts where sympathy and understanding were so highly valued, women lawyers found a corner of the legal profession especially suited to their traditional feminine virtues. "Here women of gentle, yet firm, strong character, trained in the law, yet with the mother heart . . . may find a field for labor which is truly feminine. Surely this is woman's own department," wrote one woman lawyer who argued that no male lawyer, regardless of his professional experience, could match women lawyers' understanding of childhood and domestic matters in the courtroom. \*\*

Women lawyers found some of their first opportunities for judgeships in the juvenile courts. Women such as Mary Bartelme of Chicago and Luella North of Herkimer County in upstate New York benefited from the cultural assumption that women judges would sit on the bench as the legal mothers of the children brought before them. "It seems to me," wrote one woman lawyer on behalf of women judges in juvenile courts, "that the child feels a higher regard for promises made to mother, teacher or woman than to man and that woman inspires the child to worthier and nobler achievements than men." In 1918, Woodrow Wilson put his presidential authority behind this claim by appointing a woman lawyer, Kathryn Sellers, to the position of judge of the Juvenile Court of the District of Columbia. His action won strong praise not only from women lawyers but from men in the profession as well. An editorial in the legal journal, *Law Notes*, expressed the prevailing view: "The judge of the juvenile court is a parent more than a judge, and . . . the President has done well to provide a judicial mother for the delinquent children of Washington." \*\*

<sup>80.</sup> See generally ROBYN MUNCY, CREATING A FEMALE DOMINION IN AMERICAN REFORM, 1890-1935 at 18 (1991); Louise C. Wade, Julia Clifford Lathrop, in NOTABLE AMERICAN WOMEN 370 (Edward T. James et al. eds., 1971).

<sup>81.</sup> Orfa Jean Shontz Referee Juvenile Court, Los Angeles, 6 WOMEN LAW. J. 30 (1917).

<sup>82.</sup> GRACE IRENE ROHLEDER, WOMAN ON THE BENCH 16 (1920).

<sup>83.</sup> L. L. Fawcett, Plea for Woman on the Bench, 6 WOMEN LAW. J. 37 (1917).

<sup>84.</sup> The Woman Judge, 22 LAW NOTES 83 (1918).

<sup>85.</sup> Id. On Kathryn Sellers, see What our First Woman Judge Thinks of Judging, LITERARY DIG. 46 (May 9, 1925) (on file in the Kathryn Sellers Papers at Smith College, Sophia Smith Collection, box 40, folder Sellers).

In the 1910s and '20s, cities such as Los Angeles and New York took the idea of women lawyers' special protective role in the judiciary system a step beyond juvenile courts and established separate courts for women. Drawing on the principles of protective labor legislation, the women's courts rested on the belief that women, like children, needed special protections before the law. Many argued that the harsh treatment and stiff punishments dealt to male offenders in the criminal courts were inappropriate to female offenders. Instead, women needed a different approach that emphasized understanding and rehabilitation. Within the privacy of the women's court, female offenders would encounter a wise and sympathetic woman judge who would understand their unique needs and would help them to reform.

Judge Georgia Bullock of the Los Angeles Women's Court, the first such court in the country, brought her womanly sensibilities to the bench. Her vision of the woman's court was that it should administer social welfare as much as justice. With this in mind, Bullock did not hesitate to incarcerate women, but her sentences were intended to be restorative rather than punitive. Motivated by her keen understanding of the harsh realities of poor women's lives, she often sent women to jail, but for a rest, not for a punishment:

In my court these girls and women are sent to jail—not because I want to punish them, but because I want to help them, if possible. If they are arrested and fined today, they return tomorrow to the same path. *But*, if we give them a jail sentence, they rest and receive medical treatment. Thirty or sixty days later they might come out refreshed, with brighter eyes and a gain in weight—at least a little bit better equipped to attempt a come-back to health and respectability, if they are so inclined.<sup>86</sup>

Together with the juvenile courts, the women's courts made up a separate women's legal system apart from, but supported by, the male-dominated mainstream of the legal profession. Many male lawyers encouraged the view that women lawyers, rather than men, could best interpret the law for women and children and protect their legal rights. And, women lawyers defended this claim. They were quick to argue that in the women's courts they could provide women with the justice unavailable to them from male lawyers. They claimed that while male lawyers understood the needs of men before the law, they could never fully comprehend the legal needs of women and, therefore, could not offer women full justice. "The differences between man's nature and woman's nature are a bar, eternal as are Nature's laws, to the equitable administration of justice for humanity by

<sup>86.</sup> Pat Noonan, Her Honor, Georgia Bullock, at 6-7 (unpublished essay on file in the Georgia Philipps (Morgan) Bullock Collection, Department of Special Collections, University Research Library, UCLA, box 4 [hereinafter Bullock Collection]). On Bullock in the Los Angeles Women's Court, see Beverly B. Cook, Institution-Building: A New Public Role for Professional Women in the Los Angeles Women's Court (unpublished paper delivered at the Seventh Berkshire Conference, Wellesley College, June 19-21, 1987). Bullock's willingness to imprison female offenders was similar to the practice of women doctors of the day to keep their maternity patients in their separate all-women's hospitals longer than male doctors did at their hospitals. As women, female physicians were acutely sensitive to the harsh conditions of poor women's lives, and like Bullock who imprisoned female offenders in order to give them a rest, they wanted to give their female patients the opportunity to recuperate before they returned to the demands of their family and workplace. See VIRGINIA G. DRACHMAN, HOSPITAL WITH A HEART 71-89 (1984).

men alone," wrote one woman lawyer.<sup>87</sup> In divorce cases, for example, women lawyers claimed that male judges tended to view divorce through the eye of the husband. "The judge is familiar with the wants of men in the business world," wrote one woman lawyer, "so, without meaning to be heartless or unfair, he, because of his incompetency to view the situation of the woman from the standpoint of experience, fails in complete equity."<sup>88</sup>

Women lawyers also charged that male judges were guilty of the same bias when it came to prostitutes and victims of sexual abuse. Washington D. C. lawyer Grace Rohleder explained that women could not receive fair treatment in the traditional male-run courtroom: "Men sympathize with men and make allowances for them, and in a court room filled with men, with a male judge upon the bench and male officials in every department, the unfortunate victim of male-self-indulgence will find no sympathy and very little justice." The only answer to the problem, Rohleder insisted, was the appointment of women to the bench to oversee women's cases. 90

Women lawyers appreciated the advantages which the separate women and children's courts offered them. Here they could be both women and lawyers, bringing what many of them still argued were their unique feminine qualities of nurturing, sensitivity, and understanding to cases dealing specifically with women and children.

But, the courts did more than ideologically support women lawyers' claims to the courtroom. From a practical point of view, they provided women lawyers with their best, if not only, opportunity to find positions as judges. Along with Georgia Bullock in Los Angeles, women such as Mary Bartelme of Chicago, Reah Whitehead of Seattle, Kathryn Sellers of the District of Columbia, Luella North in upstate New York, and Jean Norris of New York City all gained positions on the bench in juvenile, family, and women's courts in the early twentieth century. These courts for women and children became so popular in the early twentieth century that popular magazines such as *Good Housekeeping*, the barometer of white middle-class female culture, enthusiastically supported them.<sup>91</sup>

The idea of a separate women's legal system was not new when it gained support in the 1910s and '20s. It had been popularized in 1888 in Edward Bellamy's utopian novel, Looking Backward, in which Bellamy described his vision of the ideal judicial system for the year 2000. In Bellamy's legal system, only women judges heard cases involving women, and men judges heard cases involving men. But, Bellamy's vision for the

<sup>87.</sup> Martha Strickland, Woman and the Forum, 3 GREEN BAG 240, 240 (1891).

<sup>88.</sup> Id. at 241-42.

<sup>89.</sup> ROHLEDER, supra note 82, at 19; see also Extracts from an Interview with Judge Reah Whitehead, 5 WOMEN LAW. J. 11 (1915); Women Should be Judged by Women, 4 WOMEN LAW. J. 45 (1915); Edith Meserve Atkinson, Wanted—More Women Juvenile Judges, 5 PHI DELTA DELTA 198 (1927); Dorothy Dix, The Case for Women Judges, 59 GOOD HOUSEKEEPING 48 (1914).

<sup>90.</sup> ROHLEDER, supra note 82, at 19.

<sup>91.</sup> See Dix, supra note 89; Anne Shannon Monroe, When Women Sit in Judgment, 70 GOOD HOUSEKEEPING 46 (1920). Also, on the advantages of women judges, see Mildred Adams, Can Women Make Good as Judges?, in The Christian Advocate 1520 (1925) (on file in the Florence Allen Collection at Smith College, Sophia Smith Collection, box 1, folder 2).

<sup>92.</sup> EDWARD BELLAMY, LOOKING BACKWARD 37 (1960).

<sup>93.</sup> Id.

twenty-first century never evolved. The juvenile courts were short-lived, falling victim to women lawyers' desire for professional integration and male lawyers' insistence that women should compete as equals with men for court positions. But, for a brief time in the 1910s and '20s, women lawyers successfully staked out a territory for themselves in both the women's courts and the juvenile courts. In this era of the new woman and sexual equality, women lawyers found their greatest opportunities for judgeships and courtroom work in the separate women's courts designed to perpetuate the Victorian emphasis on woman's inherent domesticity and need for special care and protection.

It was also in this era that women lawyers further identified themselves as separate from their male colleagues by establishing their own all-women's professional organizations. In 1899, the Women Lawyers' Club of New York was founded. Others followed shortly thereafter, including the Massachusetts Association of Women Lawyers in 1904, the Women's Bar Association of Illinois in 1914, the Women's Bar Association of the District of Columbia in 1917, and the Portia Club of Milwaukee in 1920. In establishing these bars and associations, women lawyers participated in the general trend of organization which permeated the entire legal profession. Throughout the last quarter of the nineteenth century and the early decades of the twentieth, local and state bar associations grew in number and size, gradually bringing structure, hierarchy, and formality to the legal profession. From this point of view, the founding of women's legal associations placed women lawyers squarely within the mainstream of their profession. <sup>94</sup>

At the same time, the founding of women lawyers' separate professional groups revealed just how far outside the mainstream of the legal profession women lawyers really were. In fact, in establishing their own bar associations, women were motivated as much by sexual discrimination as they were by professional identification. Many of the malerun bar associations, including those of New York City and the District of Columbia, as well as the American Bar Association (ABA), did not admit women. As a result, women lawyers reached back to the nineteenth-century tradition of institution-building and founded their own bar associations because they were locked out of those run by men.

Just as women in the middle of the nineteenth-century had made their way into moral reform work, temperance, abolition, and even medicine by establishing their own separate all-women's organizations, so women lawyers in the early twentieth century established their own associations to smooth their path in the legal profession. The founding of the Women Lawyers' Club in New York City in 1899, for example, reflected the familiar themes of earlier women's organizations. On the one hand, it was borne out of discrimination. The underlying reason for its organization was the fact that women were

<sup>94.</sup> See Jean H. Norris, The Women Lawyers' Association, 4 Women Law. J. 28 (1915); Sarah Stephenson, Co-Operation of Women Lawyers, 7 Women Law. J. 68 (1918); and, Annual Banquet of the Women Lawyers' Association, 11 Women Law. J. 17 (1922) [hereinafter Annual Banquet]. On the Women's Bar Association of the District of Columbia, see Clarice F. Hens, The First Fifty Years... 1917–1967: A Brief History of the Women's Bar Association of the District of Columbia, Women's Bar Association, 1967, and Ida Moyers McElroy & Edwina Austin Avery, The Women's Bar Association of the District of Columbia, 21 Women Law. J. 21 (1935). On the Women's Bar Association of Illinois (WBAI), see Women's Bar Association of Illinois, Women's Bar Association of Illinois (UBAI), see Women's Bar Association of Illin

excluded from the Bar Association of New York City. At the same time, the Women Lawyers' Club provided women lawyers with the unique opportunity to come together for social as well as professional interaction. In 1900, it institutionalized its ties to the women's movement by joining the General Federation of Women's Clubs. 95

Sexual discrimination and feminism were once again linked almost twenty years later when women lawyers in the nation's capital founded their own professional organization because they were excluded from the Bar Association of the District of Columbia. Established in 1917 at the height of the women's suffrage movement, the Women's Bar Association of the District of Columbia had close ties to women's rights leaders. At its first annual dinner, its members hosted a number of these leaders, including one-time president of the National American Woman Suffrage Association, Dr. Anna Howard Shaw, and social worker and advocate of a juvenile court system, Julia Lathrop.<sup>96</sup>

The founding of the *Women Lawyers' Journal* in 1911 helped expand the women's bar associations beyond their local regions. The *Women Lawyers' Journal* was established by the Women Lawyers' Club in New York as a way to attract new members, and it achieved its goal almost immediately. Membership grew from twenty in 1911 to seventy-six in just two years and, by 1914, the ranks had swelled to about 130. The new members were not only from New York. They came from fifteen states as well as Canada and France. Moreover, they included some of the most distinguished women lawyers in the country, including Washington attorneys Emma Gillette and Ellen Spencer Mussey, Chicago attorney Catharine Waugh McCulloch, and San Francisco attorney Annette Adams. The new members broadened the scope and character of the Women Lawyers' Club; and, in 1913, the name of the club was officially changed to the Women Lawyers' Association to convey its national focus.<sup>97</sup>

The Women Lawyers' Journal had a special mission; namely, to meet the unique professional needs of women lawyers. It became the major vehicle for women lawyers to share a range of concerns. Its editors kept close track of professional matters such as which bar associations remained closed and which were opened to women. It invited its readers to share their views on practical matters such as how to start a practice and how to attract clients. Further, it enabled women lawyers to discuss and monitor the progress of legal reforms such as custody rights, protective labor legislation, the establishment of women's and children's courts, and suffrage. It also provided a way for individual women lawyers to announce career developments. The opening of an office, the passing of a bar, the winning of a case, or the appointment to a judgeship all became newsworthy items to share with other women lawyers.

The success of the *Women Lawyers' Journal* helped to build a national network of women lawyers. Just as the Equity Club letters had brought women lawyers together in the late 1880s, the *Women Lawyers' Journal* made it possible for women lawyers around the country to communicate with each other. To be sure, the *Women Lawyers' Journal* was a larger, more formal and structured endeavor than the circulation of the letters of the Equity Club ever was. It reached more women and persisted through the twentieth century. Still, it was fuelled by the same blend of professional and womanly concerns

<sup>95.</sup> Norris, supra note 94; Stephenson, supra note 94.

<sup>96.</sup> McElroy & Avery, supra note 94.

<sup>97.</sup> Women Lawyers' Association Dinner, 3 WOMEN LAW. J. 62 (1914).

which had inspired the Equity Club. The age-old quest of nineteenth-century women lawyers for professional community and sisterly support was unmistakable within the pages of the *Women Lawyers' Journal*. In this era of new women, it muted the call for individual success and sexual equality with its strong spirit of sisterhood.

The national influence of the *Women Lawyers' Journal* placed the women lawyers of New York at the center of the growing network of women lawyers. As early as 1919, the Women's Bar Association of the District of Columbia began to urge the Women Lawyers' Association to look beyond its metropolitan roots and to formalize its growing national influence. In 1923, the group reorganized and became the National Association of Women Lawyers (NAWL). By this time, many women lawyers were already members of the ABA, which had opened its doors to women in 1917. While membership in the ABA was an important step toward professional integration and equality for women lawyers, the leaders of the Women Lawyers' Association went forward with its reorganization into a national association, insisting that women lawyers still needed their own national organization.

Not all women lawyers agreed with the need for a separate women's professional organization. Instead, the growth of women lawyers' organizations created another arena for women lawyers to debate the larger issue of balancing sexual equality with the traditions of sexual difference. Alice Birdsall of Phoenix, Arizona was one lawyer who believed that where sexual equality existed, "organized effort . . . should not be limited along sex lines." The spirit of equality which she claimed prevailed in her state enabled women lawyers to practice "without thought of sex lines." Thus, there was "no need of separate organizations" for women lawyers in Arizona. L. H. Shoemaker of Jacksonville, Florida agreed with Birdsall that the achievement of equality with men eradicated women lawyers' need for their own professional organizations. She called for a unification of the profession, urging all lawyers, men and women, to join one national organization, the ABA: "[T]here is need for and in fact should be but *one* National Lawyers' Association, and that the American Bar Association." National

The leaders of NAWL disagreed. They claimed that NAWL would supplement, rather than duplicate, the services of the ABA, providing women lawyers with social and professional advantages which were unavailable to them in the male-run organizations. Throughout the 1920s, the leaders of NAWL continued to remind women lawyers that sexual discrimination still permeated the legal profession and that collective action, rather than individual effort, was the only way to overcome the problem.

<sup>98.</sup> See 75 YEARS OF NATIONAL ASSOCIATION OF WOMEN LAWYERS, 1899-1974 (Mary H. Zimmerman ed., 1975); Burnita Shelton Matthews, Why an Association of Women Lawyers, 21 WOMEN LAW. J. 32 (1935); Marion Gold Lewis, Minutes of the National Association of Women Lawyers, Atlantic City, 19 WOMEN LAW. J. 10 (1931); Katharine R. Pike, The National Association of Women Lawyers, 18 WOMEN LAW. J. 14 (1930); Lillian D. Rock, The Need for and the Purpose of the National Association of Women Lawyers, 18 WOMEN LAW. J. 15 (1930).

<sup>99. 9</sup> WOMEN LAW. J. 6, 6 (1919).

<sup>100.</sup> Id.

<sup>101.</sup> Id.

<sup>102.</sup> Sane Suggestions, supra note 6.

In the 1930s, this call for solidarity took on a more poignant ring. With the economic depression threatening to dismantle the inroads women had made into the legal profession, women lawyers increasingly called on each other to sacrifice individual gain for the good of the community of women lawyers. <sup>103</sup> In 1935, Burnita Shelton Matthews, the President of NAWL, reminded women lawyers that even though the ABA was opened to women, some bar associations still refused to admit women. In addition, she argued that the ABA and other sexually integrated bar associations rarely gave women committee appointments or leadership positions. Moreover, Matthews argued that in the few cases where women attained positions of stature, they owed their positions to the collective efforts of the women's bar associations, which placed continuous pressure on the male-run associations to give women lawyers a chance. Despite women lawyers' claims of progress and optimism for professional success in the 1910s and '20s, Matthews confronted the hard truth that in the 1930s women lawyers still had not reached their goal of sexual equality with their male colleagues. "Although the dawn is in the sky, the day of equal opportunity for women lawyers has not yet come," she declared. <sup>104</sup>

In order to hasten that day of equal opportunity, Matthews and others in NAWL called on women lawyers to put aside personal goals and self interest and to join with NAWL to work for the interests of women lawyers as a whole. Lillian Rock, the chair of the membership committee in 1930, emphasized the importance of creating a community of women in the law and called on women lawyers to recognize the limits of their individualism and to stand together. "No one of us, no individual standing alone, isolated, is so powerful as to be beyond the need of kindred support either in adversity or success . . . ." Yet, in this era of economic suffering and human pain, Rock pushed women lawyers even further, calling on them to use the power of women's legal community for more than professional and personal gain. "We will refuse to believe that you are content merely with the study and practice of that law; rather, we are convinced that you will want and eventually must have a part in the making and blending of that law." She envisioned NAWL as the ideal vehicle to bring about this legal reform and social change. She called on women lawyers to move past "personal success" and join in this united effort to do "something more encompassing, more humane and less personal." "105

Burnita Sheldon Matthews was one woman who built her legal career on this model of sisterhood and social concern. She worked in a law firm with two other women, Laura Berrien and Rebecca Greathouse. The three women practiced law together and shared a deep commitment to advancing women's legal rights. As a president of both the Women's Bar Association of the District of Columbia and NAWL, Matthews was a leader in the efforts to promote women lawyers' professional interests. In addition, she was a leader in the reform of women's legal rights. Her strong belief in the importance of women's equality before the law led her to the National Woman's Party (NWP). As chair of NWP's lawyers' council, she directed extensive research into the laws of the United States as they related to women. She was a strong supporter of an equal rights amendment as well as an advocate of women's property rights and juror rights. She

<sup>103.</sup> See Rosalind Goodrich Bates, Loyalty and the Woman Lawyer, 19 WOMEN LAW. J. 29 (1932).

<sup>104.</sup> Matthews, supra note 98.

<sup>105.</sup> Rock, supra note 98, at 16.

drafted the women juror law for the District of Columbia and revised the inheritance statutes of New York in 1923 so that they would no longer discriminate against women. 106

Other women lawyers, such as Sue Sheldon White and Lucy Somerville Howorth, found opportunities to link their legal careers with their politics in the new government agencies of the 1930s. Yet, these government positions were premier jobs which were not easy for women to obtain. While many women lawyers and law students looked to Washington for job opportunities, the activist government of the Roosevelt administration and its sympathy for minorities and the poor did not translate into significant job opportunities for women lawyers. Only a small group of women lawyers who had political ties received the coveted government appointments.

In 1932, Mary Connor Myers, a Washington D. C. lawyer, surveyed the federal positions held by women lawyers and discovered that the federal government during Roosevelt's administration engaged in blatant sexual discrimination when it came to the treatment of women lawyers. She found that women lawyers held only a small minority Moreover, most of their positions were classified as clerical, of federal jobs. administrative, or fiscal jobs, which required no legal training and paid a lower salary than jobs classified as professional positions. The War Department and the Department of Agriculture employed seven women lawyers each, but in neither department did any woman hold a legal position. There were nineteen women lawyers in the Department of the Interior, but only one held the status of attorney. Seventeen others were doing legal work, but under a lower classification and receiving a smaller salary. The Treasury Department employed thirteen women lawyers to do highly technical tax law but gave them less desirable assignments and paid them lower salaries than men in similar positions. Five women lawyers held strictly legal positions in the Department of Justice, but one, after her marriage, was demoted and given a salary of one thousand dollars less than the only other attorney, a man who did precisely the same work. The Department of Labor, which housed the Naturalization Bureau, the Children's Bureau, and the Women's Bureau, was the only Department that escaped complaints about sexual discrimination. Yet, even here, only a dozen or so women held professional positions. Even the Women's Bureau employed only three women lawyers and, while their work included studies of labor legislation and court decisions relative to the employment of women, they were hired as social economists rather than as attorneys.

The bleak conclusion was hard to avoid. Women lawyers who went to Washington to find positions in the federal government found sexual discrimination rather than job opportunities. "There is no doubt," wrote Myers, "despite protests to the contrary by most administrative officers, that there exists an intention, if only subconscious, to admit

<sup>106.</sup> See Burnita Shelton Matthews, Women Should have Equal Rights with Men: A Reply, 11 ABA J. 117 (1926); Burnita Shelton Matthews, The Status of Women, 1927 (typed report prepared by Burnita Shelton Matthews on file in the Burnita Shelton Matthews Papers at the Schlesinger Library, box 2, folder 51 [hereinafter BSM Papers]); Burnita Shelton Matthews, Women Lawyers and Lawmaking, KAPPA BETA PI Q., 11 (1929) (on file in the BSM Papers, box 2, folder 33); Burnita Shelton Matthews, The Equal Rights Amendment, Speech made at the Council Meeting of the General Federation of Women's Clubs in Hot Springs, Arkansas (May 1934) (transcript on file in the BSM Papers, box 2, folder 50); Burnita Shelton Matthews, Glimpse of Laws Shows Need for Equal Rights (no date available) reprinted from Equal Rights by National Women's Party (on file in the BSM Papers, box 2, folder 50). See generally BSM Papers.

professional women only to inferior positions on an equal basis with men."<sup>107</sup> Myers called on women lawyers to work together to pressure the government to open more positions for women lawyers. Echoing Rock's critique of individualism, Myers claimed that "the Horatio Alger days are over, if they ever existed." The best way for women lawyers to advance their cause was to "throw aside their individualistic attitude and proceed to accomplishment through cooperation."<sup>108</sup>

Despite the call for collective action, most women lawyers in the 1910s through the 1930s worked in a solitary way. They looked for employment in law offices, tried their hands at solo practice, or found positions in the business world of banks, real estate offices, and insurance agencies. Some considered themselves lucky if they found a job as a stenographer or law clerk, while others were unable to find legal work at all. For these women, law practice was a job they performed for financial support, detached and away from sexual politics and the world of ideals.

Like their professional lives, the personal lives of the new women lawyers fell short of their expectations. Companionate marriage, the hope and promise for the new woman, proved to be frustrating rather than fulfilling. Ideally, the companionate marriage offered women hope in its emphasis on friendship, mutuality, and equality between husband and wife, rather than the dependency, obligation, and obedience which characterized the ideal Victorian wife. Husband and wife were to be close companions who discussed household matters together and made joint decisions about financial and domestic concerns. They were to share their leisure time, and to enjoy sex together.

But the emphasis of the companionate marriage on the empowerment of women in their homes ignored the importance of their public lives. Many feminists of an earlier generation, including Charlotte Perkins Gilman and Jane Addams, lashed out at this new emphasis on women's domestic bliss, and were particularly skeptical about the sudden strident call for husband and wife to pay careful attention to the wife's sexual needs. Their skepticism revealed the fatal flaw in the modern marriage of the 1910s and '20s, namely that the new emphasis on equality and companionship between husband and wife was meant for the privacy of the home and stopped at the doorway to the world beyond. The career wife rarely received the respect and support for her work from her husband that she was expected to give to him.

Given the limitations of the new companionate marriage, many women lawyers in the 1910s and '20s were dubious about the possibility of married women competing as equals with men in the legal profession. The experience of Tiera Farrow of Kansas City, Missouri, was typical of what many women lawyers encountered. She became engaged to one of her law school classmates who persuaded her that they would "make a good team in a law office." Farrow was horrified, however, when she discovered that her fiancé's vision of their marital partnership would keep her in the office functioning as a stenographer and clerk while he went off to court. Her strong desire for sexual equality

<sup>107.</sup> Mary Connor Myers, Women Lawyers in Federal Positions, 19 WOMEN LAW. J. 19, 20 (1932).

<sup>108.</sup> Mary Connor Myers, Women Attorneys in the Department of Justice, 21 WOMEN LAW. J. 13, 16 (1935).

and her fiancé's distinctly different vision of the nature of a companionate marriage made contemplation of marriage impossible, and she broke off her engagement.<sup>109</sup>

Mabel Walker Willebrandt also discovered that a modern marriage was incompatible with her career aspirations. Just two years after she married, both she and her husband. Arthur, set their sights on studying law at the University of Southern California. The agreement between them was that first Arthur would go to law school full-time for a year while Mabel worked full-time to support them and studied part-time at night. Then in the second year, Arthur would work so that Mabel could study law full-time. Unfortunately, their agreement never worked out as they had planned. For three years, Mabel worked full-time as a teacher and principal of a school to pay for the tuition of both her husband as well as herself. At the same time, she assumed full responsibility for the domestic demands of cooking, cleaning, and other household chores. Remarkably, she found the time and energy to take evening and early morning law classes. With Mabel's support, Arthur graduated from law school in 1915. Mabel, however, was still teaching and taking law classes part-time and had yet another year of study before her. Her husband's betrayal of their agreement combined with the burden of assuming all the domestic responsibilities doomed the young marriage to failure. Faced with the choice between her marriage or a career in law, Willebrandt left her husband in 1916.

While Willebrandt's attempt at a companionate marriage failed, her divorce freed her from the encumbrances of marriage, and she began a remarkably quick rise up the professional ladder. She began her professional ascent in 1916 working as a public defender for women's cases while building a private practice. In addition, she immersed herself in professional activities and women's organizations, making a name for herself throughout California. In 1921, only five years after her divorce, President Harding appointed her to replace Annette Abbott Adams as assistant attorney general. The position made Willebrandt the highest ranking woman in the federal government and one of the most powerful women lawyers in the country. Willebrandt's struggle to study law while holding a job and caring for her husband had revealed the inequality at the heart of a supposedly companionate marriage. In contrast, her meteoric climb from public defender in Los Angeles to assistant attorney general in only five years was testimony to the personal freedom and professional opportunity she derived from leaving her husband in 1916.<sup>110</sup>

Years after her divorce, Willebrandt sought to advise younger couples on how to avoid the mistakes of her marriage. In an article entitled *Give Women a Fighting Chance*, she reinterpreted companionate marriage to meet women's needs. In Willebrandt's reconception of the ideal marriage, the wife did not submerge her needs to those of her husband. Having failed to achieve this in her own marriage, she emphasized the importance of creating a relationship of "mutual understanding" that respected and nurtured the wife's intellectual, emotional, and economic independence. The lesson Willebrandt learned from her own marital failure was that in a healthy marital partnership

<sup>109.</sup> FARROW, *supra* note 24, at 170. On marriage and career for women lawyers, see generally Drachman, *supra* note 4. On the new companionate marriage, see generally ELAINE TYLER MAY, GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA (1980).

<sup>110.</sup> See Dorothy M. Brown, Mabel Walker Willebrandt: A Study of Power, Loyalty, and Law (1984).

the husband made "necessary adjustments" so that the wife could "have both a 'child' and a 'job' if she wants both."

But even Madeleine Doty, a graduate of New York University Law School, feminist and pacifist in the 1920s, could not make her companionate marriage survive with one of the most liberal thinkers of the era, Roger Nash Baldwin, director of the American Civil Liberties Union. Their marriage had all the elements of the modern marriage of the day. Doty retained her maiden name, had an active public career, supported herself financially, and gave over the household chores to a domestic servant. All of this seemed to have the support of her husband. Years later he reminisced about their marriage: "We were both busily at work, but we shared expenses on a 50-50 basis, since we both agreed on our independence, and Madeleine was a staunch feminist. She never took my name nor did we have joint accounts save to divide 50-50 the rent and housekeeping. A maid came in by the hour, cleaned up and cooked when required, though I did most of it, since Madeleine neither could cook a dinner nor wanted to learn."

Unfortunately, neither the equality of their relationship nor Doty's independence and freedom could guarantee them happiness. In fact she and her husband had different notions of the very meaning of freedom in their lives. Doty wanted freedom in the intellectual and spiritual parts of her life; but, she wanted structure, not freedom, in the daily pattern of her marriage. "To me . . . daily life was like the red and green lights of traffic. Without them there was confusion," she explained. Baldwin, on the other hand, wanted a broader open-ended freedom that resisted any marital responsibility. Their conflicting interpretations of marital freedom doomed the relationship from the start. When Doty wanted her husband to stay home in the evenings, Baldwin resisted. "I was too obstinate to yield my presumed freedom to marriage obligations," he admitted years later. Tragically, the love Doty and Baldwin shared for each other and their attempts at compromise could not save their marriage and they divorced in 1935.

Farrow's, Willebrandt's, and Doty's failed attempts at marriage revealed the real difficulties women encountered as they contemplated marriage and a legal career. In this era when forty-four percent of the BVI women believed that companionate marriage and sexual equality among husband and wife represented the new ideals for a modern age, fifty-six percent of the BVI women questioned these new values and expressed deep concerns, much like those of Victorian women lawyers decades before, about the age-old problem of combining marriage and a law career.

Some shared the separatist view of nineteenth-century women lawyers that a woman had to make a choice between marriage and law. "Either is a full size job if properly

<sup>111.</sup> Mabel Walker Willebrandt, Give Women a Fighting Chancel, SMART SET 24, 25 (1930). See also Brown, supra note 110, at 19-34. On the more general problem of the lack of companionship women endured in the modern marriage, see R. Le Clerc Phillips, Getting Ahead of the Joneses, 154 HARPER'S MAG. 579 (1927).

<sup>112.</sup> Memo on Madeliene Zabriskie Doty by Roger Nash Baldwin (Oct. 1978) (on file in the Madeleine Zabriskie Doty Papers at the Sophia Smith Collection, Smith College, Northampton, Massachusetts, box 1, folder 4 [hereinafter Memo on Doty]); PEGGY LAMSON, ROGER BALDWIN, FOUNDER OF THE AMERICAN CIVIL LIBERTIES UNION, 121-22 (1976); Roger Nash Baldwin, in AMERICAN REFORMERS 45-48 (Alden Whitman ed., 1985).

<sup>113.</sup> LAMSON, *supra* note 112, at 151.

<sup>114.</sup> Memo on Doty, supra note 112. See also LAMSON, supra note 112, at 150-54, 210.

filled. One must choose," explained one BVI woman. 115 "If they want to practice law, eliminate the word *matrimony* from their vocabulary and vice versa," echoed another. 116 Once married, a woman lawyer assumed a host of domestic responsibilities which made it impossible for her to compete as an equal with men in the legal profession. "A single woman has a tremendous advantage over a married woman, as she can give her whole attention to her business as a man does. No married women's opportunity can compare with that of a man, married or single," wrote Bertha Green, a woman lawyer from Nebraska who was the wife of a lawyer and the mother of three children. Acknowledging that she barely practiced law and only did so "to show my family that I could support myself if I had to," she confessed that she could never figure out how to make a husband and wife equal in their professional lives. "I have never yet been able to figure out a way that would make a married woman as free in mind and body to follow her chosen business as a married man is." 117

On the surface, the views of women lawyers such as Green sounded strikingly similar to nineteenth-century women lawyers who expressed the separatist view that women could not have both a marriage and a career. But this group of modern women lawyers They rejected the notion that marriage and career were inherently incompatible for women. Rather, they believed it was the only pragmatic response to the reality of womens' lives. In taking this view, women lawyers linked their separatist stand to their sharp critique of men, who, they believed, left women no other practical choice. Pointing the finger directly at men, they accused them of holding expectations about women which made it impossible for women to manage marriage and career. One BVI woman explained that men simply did not like to marry professional women. "Men do not care to marry women with set ways, independent character, who are able to care for themselves. They admire the type, but love never. They may make excellent mothers but men want wives who are more dependent upon them and look up to them."118 Exposing the essential flaw in the companionate marriage, namely that it did not promise equal opportunity for wife and husband in the workplace, Bertha Green also held men accountable, explaining that married men simply did not intend to make the same sacrifices for their family that they expected of their wives. "A woman with a husband and children cannot make a great success of the law without neglecting them. If little Jim has the diptheria, the father takes a room at the hotel and goes right on with his practice, the mother lawyer is quarantined with Jim."119

Since this group of modern women lawyers laid the blame on men, all that was needed was for men to change—to give up their tradition-bound views of womanhood and treat women as truly equal partners. Then, claimed many women lawyers, the need for the separatist approach would disappear. As one woman lawyer explained, women would finally be able to balance marriage and career as equals with men when "a new and

<sup>115.</sup> BVI questionnaire no. 26 (no date available).

<sup>116.</sup> BVI questionnaire no. 190 (April 19, 1920).

<sup>117.</sup> BVI questionnaire no. 95 (April 3, 1920).

<sup>118.</sup> BVI questionnaire no. 150 (March 1, 1920).

<sup>119.</sup> BVI questionnaire no. 95 (April 3, 1920).

different generation of men arrives who will be trained to regard women as equals in all respects."<sup>120</sup>

While some women lawyers took the separatist approach to marriage, more than three times as many expressed the Victorian view that marriage must take priority over career in the life of a married woman lawyer. "A woman should give up her profession when she marries," explained one woman lawyer. "I believe woman's true sphere is in the home," echoed another. "[A] true woman gladly fills her place in the home when true love comes."

While this sounded like the nineteenth-century Victorian view of marriage, it was really a revised version more suitable to the new century. Like the reconstructed separatist approach of the early twentieth century, the new version of the Victorian view no longer projected an absolute, immutable condition. Rather women understood the Victorian approach as a practical response to the realities of a woman's life. Personal sacrifice was not a universal reality for all married women. Embedded in the advice to follow the husband's lead was the unspoken message that a woman could, in fact, combine marriage and law if she married a man who treated her fairly.

Nor did children require absolute sacrifice on the part of the mother. Rather, women lawyers in 1920 believed that motherhood necessitated only a temporary sacrifice when children were young and at home. "If there are children," explained one woman, "there seems to be no other way then to drop out of the profession for a few years." Another, Sarah Shulkjobe of Hope, Arkansas advised women to marry a lawyer, miss a few years when their children were young and then to "get right back into work." Hortense Ward, the first woman to be admitted to the Texas bar, followed this model. She "was the usual married woman with three small children" before she joined her husband, also a lawyer, in practice. 125

To these women lawyers, it was motherhood, not marriage, that required the sacrifice of their legal careers, and even this sacrifice was short-lived. "Unless there are children, there should be no conflict," explained one. Another echoed this same view by stating that when "no children bless the union . . . it would be unthinkable to engage in no profitable or worthwhile business. The world needs workers too badly for women to sit idle." Florence Allen, well-known as a pioneer woman judge, revealed the same views. "I believe that the time of the average housewife is taken up more with the *house* than with the *family* except when the children are small," she explained. 128

While women lawyers in 1920 may have viewed marriage and career in a more progressive way than women lawyers in the 1880s, their views were a far cry from the self-assured claim to companionate marriage that seemed to propel so many women of

- 120. BVI questionnaire no. 254 (Aug. 10, 1920).
- 121. BVI questionnaire no. 142 (March 5, 1920).
- 122. BVI questionnaire no. 148 (March 2, 1920).
- 123. BVI questionnaire no. 152 (March 20, 1920).
- 124. BVI questionnaire no. 136 (March 2, 1920).
- 125. BVI questionnaire no. 26 (no date available). See also BVI questionnaire no. 242 (April 26, 1920).
- 126. BVI questionnaire no. 189 (no date available).
- 127. BVI questionnaire no. 131 (March 27, 1920).
- 128. BVI questionnaire no. 6 (March 12, 1920).

this new generation into matrimony. In fact, many of the BVI women had serious doubts about how a woman lawyer would actually organize her life to balance marriage and career. Throwing their hands up in the air, they left that task to each individual woman. In doing so, they freed women from the behavior expected of Victorian women and embraced instead the new emphasis on individuality and diversity among women. But with this freedom came little guidance. Some (eight percent) admitted they had no idea how to resolve the paradox. Many of the staunchest advocates of marital equality (twenty-two percent) were at a loss to offer women any concrete suggestions on how to achieve that equality. Instead, they saw the question of balancing marriage and career as a personal one that each woman would have to resolve for herself. "If a professional woman marries and has children" wrote one woman, "whether she continues her chosen vocation is too personal for me to undertake: I can't dictate what her course shall be."129 Another woman echoed her sentiment: "If a woman marries, she should solve her own problems. Any woman capable of passing a bar examination has mentality enough to map out her own life."130 Single women felt especially unqualified to offer advice. "I am a spinster," explained one woman lawyer, "[m]y theories of marriage are so entirely without practical experience in the subject that I have no judgment in the matter."<sup>131</sup> Another echoed her views: "Tis not for a very contented old maid to rush in where angels fear to tread."132

Simply put, to many women lawyers who advocated the integrated view of marriage and career, the question of how to balance the two successfully was "a matter of individual taste." These women lawyers in 1920 insisted that each woman must reach her own solution, emphasizing individuality and diversity among women. Embedded within this emphasis was the new political goal shared by many women in the early twentieth century to replace the Victorian goal of equity between men and women with the modern goal of sexual equality.

However, this tendency to place the problem of balancing marriage and career in the hands of each individual woman lawyer revealed a darker side as well. Despite the optimistic claims about the hope of a future where women lawyers could balance marriage and career just as men, the call was more rhetoric than reality. Even among those women lawyers who were the most enthusiastic about the pursuit of this marital equality, half were at a complete loss to offer women lawyers any ideas about how to arrive at this goal. Moreover, by the mid-1920s, many women lawyers discovered first hand how difficult it was to balance their careers with marriage. Some, like Doty and Willebrandt, grew tired of the struggle and gave up their marriages. Others took the more traditional route, sacrificing their careers to save their marriages. Some women lawyers in 1920 counseled younger women to give up their career aspirations if their husbands did not want them to work. "[I]f your husband objects to your pursuing your profession, give it up," explained

<sup>129.</sup> BVI questionnaire no. 156 (March 8, 1920).

<sup>130.</sup> BVI questionnaire no. 145 (March 1, 1920).

<sup>131.</sup> BVI questionnaire no. 146 (March 7, 1920).

<sup>132.</sup> BVI questionnaire no. 19 (March 19, 1920).

<sup>133.</sup> BVI questionnaire no. 304 (July 20, 1920). See also BVI questionnaire no. 122 (no date available).

one woman.<sup>134</sup> "[I]f the man objects," echoed another, "for the happiness of all concerned, give it up."<sup>135</sup>

Lucy R. Tunis, of Boston, followed this advice. Though she was a successful lawyer, she abandoned her active career for her husband. In an article entitled "I Gave Up My Law Books For A Cook Book," she admitted to the readers of *American Magazine* that she had failed in her attempt to have both a marriage and a career. When she faced a choice between her own professional needs and those of her husband, she willingly abandoned her law practice in Boston and moved with her husband to New York. But according to Tunis, her sacrifice brought its own rich rewards, namely domestic fulfillment in the sanctuary of her home:

And what was I to get in return? I would find happiness in the home that I knew I could create, the home that was to be an inspiration for my husband. I would gain satisfaction in being perfect at one job at least, in conquering the problem of housework that had baffled me, and in striving to make the husband I loved happy.<sup>137</sup>

In reality, there was no single, simple answer. Despite all the optimistic claims about equality for women in marriage and the possibility of balancing family and career, the truth was that for most women lawyers in the early decades of the twentieth century, marriage and law were not so easy to balance. Instead, a woman lawyer still faced the wrenching choice between building her career and nurturing her family. Sue Shelton captured the no-win situation: "Marriage is too much of a compromise; it lops off a woman's life as an individual. Yet the renunciation too is a lopping off. We choose between the frying-pan and the fire—both very uncomfortable." 138

By the 1930s, several issues were clear. Women lawyers were practicing law in every state of the union and had established themselves as permanent members of the legal profession for the twentieth century. They worked in a wide range of situations including solo practice, law firms, business offices, government agencies, and courts. These accomplishments had fueled the optimism that many women lawyers shared at the beginning of the twentieth century. But by the 1920s many women lawyers began to recognize the limits of their professional progress. As they continued to encounter sexual discrimination, their high hopes of the future gave way to a more realistic acceptance of their current situation. The prediction in the 1920s of sexually integrated law firms in the 1930s looked increasingly naive and unattainable. Gradually, women lawyers faced the harsh truth that they were far from achieving their goal of professional equality with men.

And, so we return to Mary Lathrop, the first woman to integrate the ABA in 1917, who by 1930 had come to recognize the limits of women lawyers' accomplishments.

<sup>134.</sup> BVI questionnaire no. 134 (no date available).

<sup>135.</sup> BVI questionnaire no. 144 (March 31, 1920).

<sup>136.</sup> Lucy R. Tunis, I Gave Up My Law Books For a Cook Book, Am. MAG. 34, 173 (1927).

<sup>137.</sup> *Id.* at 174; see also Jane Allen, You May Have My Job: A Feminist Discovers Her Home, 87 F. AND CENTURY 228 (1932).

<sup>138.</sup> THESE MODERN WOMEN: AUTOBIOGRAPHICAL ESSAYS FROM THE TWENTIES 52 (Elaine Showalter ed., 1978).

"The law is a man's field and will remain so. It will always be a battle for women." Five years later, Burnitta Matthews echoed Lathrop's lament about men's power. "We live as yet in a man's world instead of a world for *all* human beings." Moreover, even as women lawyers as a group traded in their optimism for a more realistic assessment of the task before them, they reached no consensus on how best to achieve their goal. Some women lawyers held on to the traditional feminine ways by reinterpreting the notion of sexual differences and women's unique virtues for the twentieth century. Others turned their back on these nineteenth-century values and pushed forward on their professional road, claiming the virtues of universal equality between men and women. For all women lawyers, the challenge of equality remained unresolved.

<sup>139.</sup> Bar Group, supra note 1.

<sup>140.</sup> Matthews, supra note 98.

## LOOKING BACKWARD, LOOKING FORWARD: A CENTURY OF LEGAL CHANGE

## LAWRENCE M. FRIEDMAN\*

## INTRODUCTION

A hundred years ago, or so, the Indiana University law school began operations at Indianapolis. A hundred years is not very long in terms of fossils or galaxies; but it is more than the normal human lifetime. A lot can happen in a hundred years. In the contemporary world, a hundred years can mean an incredible amount of sheer change—social, technological, economic. I have the job of talking about those changes. I am supposed to say something about the legal world of the newborn law school; and to contrast it with the legal world of today, a century later.

First, a word of caution. In many ways it is impossible to recapture the past, even the relatively recent past. Certainly, there are documents, records, even photographs. We can look at the streets, the houses, what people wore; those faded old photographs, so eerily beautiful in their own way, capture the past in every last detail, preserving it like flies in amber. Yet in another sense, these photographs are misleading, all the more so because we think they show streets, buildings, houses, and clothing exactly as they were. But what we see, of course, are externals. We never quite see with the eyes of the people who stare at us out of the photographs. What seems old-fashioned to us was sparkling and modern to them. For them, the future was unknown; we, on the other hand, are looking backwards in time; we know how the story turned out.

I do not want to make too much of this. History is not a science, but it is possible to be scientific *about* history. It can never be exact, but we can make fair approximations. Every generation sees history differently; but there are limits beyond which revisions never go. Every generation stages *Hamlet* in its own way, but Shakespeare's text is the common core.

These points would strike historians, I suppose, as obvious, boring, and banal. But lawyers, I am afraid, desperately need some basic instruction. Lawyers are, on the whole, very bad historians; and not by accident. The working lawyer deliberately manipulates and distorts the past, for the sake of legal argument. A lawyer looks at old cases the way a cat looks at a canary. She has no interest in understanding them historically, or in context. She looks on them as food, fuel, nothing more. When these cases, or other materials, turn out the wrong way (from the lawyer's point of view) they have to be ignored, or explained away. If that takes twisting and obfuscation, well, so be it. What the client needs is paramount. Historical truth would be a luxury; or worse, a way to lose your case. But enough in the way of preambles.

## I. THE LAW SCHOOL WORLD

I want to begin with a few remarks about the world of legal education into which the law school entered in 1894. There were, of course, far fewer law schools than there are

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today. But the situation was rapidly changing; the decade of the 1890s was a decade in which the market "exploded," as Robert Stevens has put it. By the turn of the century there were almost one hundred law schools. Most of them were part-time or night schools, or had part-time or night divisions. There were over 11,000 law students in attendance at these schools. The apprenticeship system still claimed a substantial portion of the practicing bar; but this system was crumbling fast. Stevens notes that the "invention of the typewriter no doubt released more part-time students for day schools (the female secretary having replaced the male clerk)." He might have gone further, and claimed that the typewriter, or, more broadly, changes in the way law offices were managed and run—the new technology of paper-work—doomed the apprenticeship system. There was no longer any need for these law clerks and copyists. What was needed was people who could file and type. Hence these jobs—typing, steno, and the like—became jobs in themselves; or, more accurately put, they stopped being the lowest rung on the ladder of legal success. They became dead-end jobs. At the same time, of course, they became jobs for women rather than men.

The 1890s, then, were boom times for law schools. Legal scholarship, on the other hand, was still fairly traditional—treatises and guides for the practitioners, for the most part. The case-book was a relatively new form of literature, if you can call it that. There were very few law reviews, as we know them and love them today; only a handful of legal periodicals were connected to universities and their schools. The *Harvard Law Review* was one of the pioneers; and the law review people were already considered elites of the law school world.<sup>3</sup> Harvard, in 1894, was busy putting out issues six through eight of volume seven, and issues one through five of volume eight (the *Review* was published monthly during the academic year). These volumes are still on the shelves of most law schools, though in the course of a year, hardly a student or faculty member is likely to look at them.

The contents of these reviews would strike the modern reader (I hope) as rather dry and dismal. Mostly the articles are about doctrine. There is a good deal of something that might barely pass as history; social history most assuredly is not present. There are far fewer footnotes than one would find today—a welcome relief—but, surprisingly, a high percentage of these are footnotes to English sources. One article by Edward Keasbey, according to my rough count, cited just about as many English as American authorities.<sup>4</sup> This most certainly does *not* reflect the state of American case law at the time. In the 1890s, English citations were a small and diminishing portion of the whole. It does reflect, I think, the fact that legal education and legal scholarship were pretty arid stuff, fixated on the past, on the doctrinal history of common law concepts.

<sup>1.</sup> ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 75 (1983).

<sup>2.</sup> *Id*.

<sup>3.</sup> Young Learned Hand (then known as Billings L. Hand) appeared on the masthead of the *Harvard Law Review* of 1894 for a brief time; Hand resigned after working on four issues. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 44, 46 (1994).

<sup>4.</sup> Edward Quinton Keasbey, The Right of a Third Person to Sue upon a Contract Made for his Benefit, 8 HARV. L. REV. 93 (1894).

This is confirmed by another obvious but interesting fact about the *Harvard Law Review* of 1894. There may have been a lot of things happening in the country, and in the world; but you would never guess what they were from the pages of the *Law Review*. There was an article by Oliver Wendell Holmes, Jr., entitled *Privilege, Malice, and Intent*;<sup>5</sup> there was a certain amount of antiquarianism;<sup>6</sup> but current problems of the real world, even the real *legal* world, were almost totally absent. The *Harvard Law Review*, like legal education in general, reflected a particular theory about legal scholarship (and legal training). Legal scholarship was concerned with the "common law" and its development; and that was exclusively a matter of the unfolding of doctrine over time. Legal education was training in doctrine and in this sort of "common law" religion. From our standpoint, it was the last word in sterility: bare bones, with all the meat and juice blasted out of them.

Harvard was not alone in these habits. One gets essentially the same impression from Volume Three of the *Yale Law Journal*, another of the very small band of university law reviews. An article on the legal status of the oyster<sup>7</sup> had the virtue of novelty; but basically the rest of the articles were all of the *Harvard* type.

The students who went to law schools in those days were, of course, almost exclusively men, and almost exclusively white; and primarily good old-fashioned north European Protestants. There were a handful of women at the few schools which let them in, like the University of Michigan, but they must have been unusually persistent and able people. There were only about a thousand women practicing by the end of the century, in about twenty states. Black lawyers were few and far between. There were, to be sure, a growing number of ethnic lawyers, immigrant lawyers and the children of immigrants, leavening the old-American masses; these newcomers flocked to the new night and part-time law schools. This new wave of lawyers evoked a lot of muttering from the old-timers; the bar was highly stratified then as now, and the elites looked down at the small-time lawyers, many of them ethnics, who went to the night and part-time law schools, and who were condemned as ambulance chasers, pettifoggers, and local shysters. These ethnic lawyers came to dominate city and county politics, but Wall Street, La Salle Street, and the rest of the high-flown financial centers continued to ignore and disdain them; and to denounce them from their ethical pulpits.

Lawyers, law students, and law teachers in 1894 who looked back themselves might have raved about how thoroughly and completely the world had changed, in the hundred years before *them*. In 1794, there was not only no Indiana law school; there was no Indiana. There were also no railroads, no telegraphs, no telephones, no cameras, no electric light bulbs. All of these marvelous inventions had been far in the future; and when they emerged, they helped transform the legal world, in large and small ways. A legal revolution, in other words, matched the social and technological revolution that took place in the nineteenth century. The candid camera probably helped create the right of

<sup>5. 8</sup> HARV. L. REV. 1 (1894).

<sup>6.</sup> John Andrew Couch, Women in Early Roman Law, 8 HARV. L. REV. 39 (1894).

<sup>7.</sup> John H. Perry, The Legal Status of the Oyster, 3 YALE L. J. 87 (1894).

<sup>8.</sup> DEBORAH L. RHODE, JUSTICE AND GENDER 23 (1989).

<sup>9.</sup> See generally, Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America (1976).

privacy, because now, for the first time, it was possible to steal somebody's image without his consent. <sup>10</sup> In 1894, too, electricity was on its way to remaking the world; and the marvelous machines and devices that depended on electricity would produce an enormous volume of new law. At the time, this was perhaps only dimly perceived. One legal use of electricity, however, was quite gross and obvious. A few years before 1894, one William Kemmler, an unsung hero of American history, achieved an honor he probably would have been happy to forego: he was the first person to die in the new-fangled electric chair. <sup>11</sup>

The electric chair is, perhaps, only a minor example of legal change. But the total content and structure of the law had changed enormously in the course of the century. Whole fields, like tort law, which had barely existed in the eighteenth century, sprang up almost out of nowhere, and became pillars of curriculum and practice. In 1794 there was, practically speaking, no law of corporations—business corporations, at any rate; and, of course, the concept of a law school did not really exist in the early Republic. In short, the men who founded the new Indiana school, in 1894, were people who were used to legal and social change, and who probably believed very strongly in progress. If you asked them what the world would be like a century later, they would not know the answer—of course—but they would be sure the world would be different; very different; and probably better at that. Perhaps they would have given the same answer about the law, legal institutions, and law schools.

They might or might not be consciously aware of something that seems obvious to us today. The forces that produced all those dizzying changes, between 1794 and 1894, in the curriculum, and in the body of the law, were not *internal* to the legal system, but external. The changes had very little to do with legal thought, with Oliver Wendell Holmes Jr., or even with C.C. Langdell or Joseph Story. They had everything to do with mobility, abundance of land, industrialization, heavy immigration, and, above all, the magnificent new technologies. It would hardly be an exaggeration, for example, to say that the railroad *created* tort law;<sup>12</sup> and the factories and mines, turning out steel, coal, machines, tools, and railroad cars, added to tort law as they went about busily injuring people and stimulating litigation; the factories and mines also created a wholly new world of "master and servant," that is, industrial relations—it was a period of labor unrest, class conflict, strikes, boycotts, injunctions, producing, one might add, a new field, labor law, that Jefferson and his contemporaries could have hardly imagined.<sup>13</sup>

The common law had been turned completely on its head in the course of the nineteenth century; and the body of statutes likewise. Roscoe Pound delivered a famous speech, published in 1906, in which he went on about the causes of popular dissatisfaction

<sup>10.</sup> See the famous article by Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>11.</sup> See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 171 (1993). The Supreme Court upheld the system of death by electrocution in *In re* Kemmler, 136 U.S. 436 (1890); see also Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551 (1994).

<sup>12.</sup> See Lawrence M. Friedman, A History of American Law 468 (2d ed., 1985).

<sup>13.</sup> See, e.g., William E. Forbath, Law and the Shaping of the American Labor Movement (1991).

with the law. Pound claimed that the common law was, among other things, far too individualistic; as a consequence, it stood in the way of necessary social changes. In some ways, however, this is a most peculiar complaint about the common law. The common law, after all, developed in England, in the Middle Ages, in a monarchy, in a feudal society, long before anybody had ever heard of Adam Smith, a free market, modern individualism, and the like. If the common law had become a bastion of individualism, it was not because of anything inherent in it, or its historical roots, but because of political and social developments in the course of the nineteenth century, plain and simple.

The federal system had undergone considerable change in the period after the Civil War. Of course, the war itself was fought, in part at least, on an issue of federalism. American wars, especially drastic ones, strengthen the central government at the expense of the localities. Still, from our standpoint, the national government was small and feeble in 1894. Washington was basically a small town; the vast army of federal civil servants was far off in the future; and the federal tax bite was puny indeed. In 1894, the federal government did pass an income tax law; but by modern standards it was a popgun. It taxed incomes above \$4000 at a flat rate of two percent; and it was declared unconstitutional in 1895. In fact, the federal government had very few ways of scrounging around for dollars—excise taxes (some of them, like the tax on whiskey, were hard to collect), customs fees, land sales, and little else.

The federal government of the day did not, from our standpoint, do very much. Most lawmaking and law enforcement was at the state level. It was the states that regulated such businesses as the insurance companies; and whatever there was (not much) of health and safety regulation. But change was in the air. The Interstate Commerce Commission Act was passed in 1887;<sup>16</sup> the Sherman Antitrust Act, three years later.<sup>17</sup> These Acts were responses to the nationalization of the economy. State borders were meaningless to the giant railroad nets which the railroad moguls stitched together. The telephone and the telegraph helped make one country out of a collection of states. No one state could control the giant railroads, or the awesome trusts that seemed to have a strangle-hold on the economy. In frustration, fear, and anger, blocs of voters turned to the federal government for salvation. Later on, a similar burst of public emotion led to the passage of a federal food and drug law in 1906.<sup>18</sup>

The late nineteenth century was thus the period in which some of the foundationstones of the modern regulatory state were laid. We have already mentioned the Interstate Commerce Commission Act. There was a growing sense of mutual interdependence in society, but also a sense of vulnerability. Economically, the small merchant, farmer, or worker felt himself at the mercy of the giant trusts. Mass-produced foods could endanger health in ways that home-cooked goods did not; this was the brute fact behind the pure food laws. The rich crop of maimed workers and passengers produced a movement for safety regulation as well as a body of tort law.

<sup>14.</sup> Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 40 AM. L. REV. 729 (1906).

<sup>15.</sup> FRIEDMAN, supra note 12, at 565-66; Pollock v. Farmers Loan and Trust Co., 158 U.S. 601 (1895).

<sup>16. 24</sup> Stats. 379 (act of Feb. 4, 1887).

<sup>17. 26</sup> Stats. 209 (act of July 2, 1890).

<sup>18.</sup> FRIEDMAN, supra note 12, at 681.

People who lived and wrote in 1894 sensed that they lived in an age of transition; but this was nothing new. Every generation since the industrial revolution has probably felt that way. There is no question, however, about a sense of crisis, which had gripped some members of the society, in the late nineteenth century—a sense that old-fashioned values were eroding, old arrangements crumbling. In 1893, Frederick Jackson Turner published his famous essay, "The Significance of the Frontier in American History." Turner emphasized how important the frontier had been, in terms of American character and institutions; but he also pronounced the frontier, as Americans had known it, to be dead, departed, gone.<sup>19</sup>

Progress no longer seemed quite so inevitable; resources no longer seemed quite so infinite. The millions of buffalo had shrunk to a precious handful. There were the beginnings of restrictions on immigration. There was also a kind of moral crisis. Public pressure (coming from respectable elites) led to new emphasis on rules and laws against victimless crime—vice, gambling, pornography, sexual license—starting around 1870, and reaching some sort of climax in the early twentieth century. America, the good folks felt, was in trouble; criminals, low-lifes, the feeble-minded—and immigrants from muchtoo-foreign countries—threatened to swamp the old Americans and their values. The result was a kind of eugenic panic. Indiana, in fact, would become one of the pioneer states in the movement to keep inferior people from breeding. Indiana enacted a sterilization law in 1907.

In 1894, there were plenty of civil war veterans around, and memories of the Civil War were still very vivid for millions of people. But whatever zeal the war kindled for racial equality was long since gone. Congress had passed a series of civil rights laws; but in the 1880s, the Supreme Court declared them unconstitutional.<sup>22</sup> In 1896, two years after the founding of the Indiana Law School at Indianapolis, the Supreme Court handed down *Plessy v. Ferguson*, the infamous separate-but-equal case.<sup>23</sup>

We have already mentioned the labor unrest of the late nineteenth century. Much of the action took place on the streets and in factories, but inevitably conflicts also spilled over into courts and legislatures.<sup>24</sup> The Indiana Session Laws of 1893 and 1895 reflected these labor conflicts. An amendment made it illegal for any company "manufacturing iron, steel, nails... machinery or tobacco" to employ any child under fourteen; or for any manufacturing company, which legally employed kids, to work them more than eight hours a day.<sup>25</sup> Another law required certain mining and manufacturing companies to pay employees every week, "in lawful money of the United States." The point was to outlaw payment in certificates redeemable only at the infamous company store.<sup>26</sup>

<sup>19.</sup> See FRIEDMAN, supra note 12, at 338.

<sup>20.</sup> See FRIEDMAN, supra note 12, at 585-88.

<sup>21. 1907</sup> Ind. Acts 215.

<sup>22.</sup> Civil Rights Cases, 109 U.S. 3 (1883).

<sup>23.</sup> Plessy v. Ferguson, 163 U.S. 537 (1896); see Charles A. Lofgren, The Plessy Case: A Legal-Historical Interpretation (1987).

<sup>24.</sup> See FORBATH, supra note 13.

<sup>25. 1893</sup> Ind. Acts 78 at 147-48.

<sup>26. 1893</sup> Ind. Acts 114 at 201 (amending a law of March 5, 1891).

Another labor-related issue that agitated the country was the issue of convict labor. <sup>27</sup> Convict labor was a real thorn in the side of organized labor, which considered convict labor to be a form of unfair competition, a threat to jobs and wages. In Indiana, a Senate Concurrent Resolution, approved March 13, 1895, began with a recitation that the question was "of much importance to the prosperity of free labor." The resolution went on to note that North Carolina and some counties in New York had "successfully used convict labor for improving the public highways;" it called for a Commission to "correspond with the authorities" in states using convict labor on the roads, to find out how the system was going, and report back to the General Assembly. <sup>29</sup> Two days later, the General Assembly adopted a bill forbidding anyone from selling convict-made goods without a license. All convict-made goods coming in from outside Indiana had to be "branded, labeled or marked" with the words "convict-made," together with the "year and name of the penitentiary, prison, reformatory . . . in which it was made, in plain English lettering." <sup>30</sup>

How much of this ferment, the stirring and moiling, the agitation, entered the walls of the law schools? How much of it was debated in class? How much of it found its way into the curriculum? Very little, I suspect, but it is impossible to tell. Probably, like most law schools, law was studied as a cold, detached body of principles, pure, transparent, frozen into fixed shapes, like icicles. Most of the law schools in the country either had passed over or were going to pass over to the Harvard religion: Langdellianism, and the Socratic method.<sup>31</sup> The use of this method practically guaranteed a total detachment of law from politics. If there was to be any discussion of the real world, with all its problems and conflicts, it would take place in the hallways and corridors, not in the classroom.

#### II. FAST FORWARD

That was 1894; a hundred years have gone by, and the Indiana Law School at Indianapolis is in the process of celebrating its successful voyage over time. The school is now mature, adult; and it inhabits a legal, and social, world much altered from the world of its founders.

How different are the law schools themselves? In some ways, very different; in some ways much the same. Some aspects of curriculum have proven to be amazingly tenacious, clinging to life like barnacles on a rock. The same old stuff is taught, particularly in the first year of law school, and in the same old way. Many of the cases, of course, are recent. A lot of teachers have abandoned the Socratic method, and the case-books are a lot fancier, more expensive, and Lord knows *longer* than in Langdell's day; but at bottom there is a certain surprising sameness. Langdell's idea of teaching "legal science" through

<sup>27.</sup> See FRIEDMAN, supra note 12, at 602-03.

<sup>28. 1895</sup> Ind. Acts clvii at 372.

<sup>29.</sup> *Id*.

<sup>30. 1895</sup> Ind. Acts clxii at 379, 381.

<sup>31.</sup> On this movement, see STEVENS, *supra* note 1; Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGINS OF MODERN AMERICAN LEGAL EDUCATION (1994).

the case-method did not last very long; but the basic method was repackaged as a way to teach people how to think like lawyers, and in that form, it very definitely lives on.

This is not to say that legal education has not changed at all; the classic system which Langdell created is now considerably frayed about the edges, particularly in second and third year courses. Economics and philosophy have made shocking inroads into the classroom and the course-books; and bits of history and sociology or psychology have crept in as well. There are clinical courses and clinical experiences in most schools, something that Langdell would not have tolerated for a moment. Langdell's formalism is also in very bad odor. Everybody gives lip service to a kind of watered-down legal realism, in principle at least.

But Langdell could still take considerable comfort from the actual practice in many law schools. My impression is that, in most courses and most schools, law is still taught very much from the "internal" standpoint. The "realism" of the professors is only skin deep. Doctrine is taken seriously, is treated as an important and causal variable; classroom instruction puts heavy emphasis on legal craftsmanship, on technique, on "thinking like a lawyer." All this assumes that doctrine and craftsmanship make a real difference, a crucial difference, to the outcome of cases and to the legal order in general; the outside world, with its dirty politics, its competitive striving, its complex and messy fabric of culture, gets inside the classroom door only reluctantly and somewhat gingerly.

Legal scholarship, to be sure, is much broader than it was in 1894. There certainly is more of it. There were only a handful of law-school law reviews in 1894; in 1994, every school worth its salt has one, and a lot of schools that are not worth salt or anything else have law reviews as well. Moreover, since *everybody* has a law review, the fancier schools are no longer content to publish just *one*; they put out two, three, five, or six law reviews. There will be one all-purpose review, usually the oldest (and probably the best), supplemented by specialized journals on this, that, or the other thing.

In some ways, too, the tonier law reviews are the opposite of what they were in 1894. They pay very little attention to doctrine, except in constitutional law, the last bastion of legal theology; they tend to be very trendy; and they operate in the high, mystic world of something called "theory," whether it is critical theory or liberal theory or just plain theory. In some law review articles, you can find graphs and equations; in others, there are stories, and personal reminiscences, usually described as "narrative." There are hamhanded attempts at humor and occasionally even a poem. Nobody cites Chitty anymore, or even Blackstone, and the Brits have largely disappeared from the law review. But lots of young professors cite Wittgenstein, Clifford Geertz, Foucault, Noam Chomsky, and who knows who else.

In short, the law reviews, or some of them, have abandoned dry, dead doctrine and sailed right into some sort of post-modern or critical wonderland, without ever stopping at some rational point in between. There are, of course, dozens of practitioner journals and specialized scholarly journals, catering to other audiences. These supply needs of markets the regular law reviews have given up; or they provide a home for scholarship which can be reviewed and judged by genuine experts in the field, rather than by second or third year law students. But one cardinal fact remains: what the regular university law reviews do and say and write about has very little bearing on the work of the profession; and reflects what is happening in society at large only dimly.

Physically, the law schools may or may not look different on the outside, depending on how good deans have been at fund-raising or persuading state governments to put up

money for buildings. On the whole, they are bigger than they were a century ago. Inside the law school, the visitor from another century would be amazed by the computer terminals, and the TV sets in the courtrooms; the visitor would wander around in vain looking for a card catalogue. The student body would also look very different to this visitor. Hardly anybody wears a hat these days. More strikingly, not all of the faces are white; and almost half of the students are women. One of the most interesting research questions of the day—but far from an easy one—is, what impact do these demographic changes have, first of all, on teaching and research; second, on the profession, and last, on the body and soul of the law. The disappearance of the hat brought about very little change; the influx of women may be another story.

As for the law itself, in some ways what has happened since 1894 simply continues the great master trends of the nineteenth century: the population of the country keeps on growing, fueled in part by immigration; the economy is immensely greater than it was, but still vibrantly entrepreneurial; technology is still transforming the world, in fact more so than ever before. In 1894, nobody could have predicted mass use of automobiles, or the coming of jet airplanes, antibiotics, computers, air conditioning, satellite communication, television. Each of these has had an impact on the law, sometimes an enormous one. Railroads created the tort law of the nineteenth century; the automobile had a similar influence in the twentieth. Medical malpractice, almost unknown in the nineteenth century, has been transformed in an age of miraculous medicine. It is now a subspecialty in tort law of impressive scope and reach. The primitive medical tools of the nineteenth century rarely cured anybody; but the expectations of patients were also low; and what medicine did or could do seemed not to lead to the kind of disappointments or fits of anger which bring out the lawsuit in a person.<sup>32</sup>

Obviously, too, the massive social upheavals of the century have left their imprint on the law: two world wars, and wars in Korea and Vietnam; Prohibition, the New Deal, the civil rights revolution, feminism, the cold war, the environmental movement, to reel off a few from the top of my head. Prohibition filled federal prisons to overflowing; the drug wars do the same dubious service today. The New Deal was a great watershed in the history of administrative law. Agency after agency was created in Washington; and very few of them have ever given up the ghost. Indeed, in later years, still more agencies were created—the New Deal was worried about jobs, not environmental protection or clean air, for example, and the EPA is a much later creation.

Is there any way to sum up all of these colossal events and all these radical changes in the legal order? Are there any aspects that bind them together? I think there are. I will mention only one or two which I consider particularly salient. The nineteenth century believed in progress, and in the march of science and technology. The twentieth century believes in ceaseless change; it knows that science and technology are transformative, but it is not quite so sure that change can be described as "progress." Still, the absolute cornerstone of our legal culture is the belief that law is not only changeable, but that it can and ought to change constantly.

The twentieth century is the century of what we might call *legalization*, for want of a better term. I use this word to refer to the expansion of the potential domain of law. In

<sup>32.</sup> See LAWRENCE M. FRIEDMAN, TOTAL JUSTICE (1985), for a general treatment of the rise of liability in this and other situations.

other words, there is no issue, or almost no issue, which the law cannot reach, in the appropriate situation. There are no zones of immunity.<sup>33</sup> I do not mean that law in fact routinely interferes in every area of life—for example, in parent-child relationships. It mostly in fact stays out. Nor does law have anything much to say about happy marriages. But in the odd case, the extreme case, law can assert itself in places once completely beyond the pale. If I give a student a low grade in my course, he *might* eventually take me to court on this issue. This hasn't happened to me yet, and I hope it never will; it is a very, very rare type of suit; but it is not, legally speaking, impossible. And the mere fact that it *might* happen may, in subtle and not so subtle ways, change the internal atmosphere of universities—"legalize" them, in a word. The law, today, is or can be ubiquitous. Nobody and nothing is immune.

Another massive new development is what I call plural equality. The subject is complicated; the key idea is the decline and fall of a certain kind of moral and social dominance. It was once taken for granted that one group, one race, one gender, one religion, one way of life had and ought to have a special place in America; America, in a sense, belonged to the ruling strata. Other people were sometimes tolerated (sometimes not); but it was clear that the country, in an important psychological and political sense, did not belong to them. This idea is in serious trouble in the 1990s. The rival doctrine is plural equality. The country is conceived as a coalition of sub-nations, all of them, in theory, entitled to dignity and respect; and each of them entitled, too, to a decent shot at privilege and power.

Elsewhere I have tried to explain where this notion comes from.<sup>34</sup> I have tried to connect it with changes in legal culture, and, in particular, the rise of expressive individualism. Without going into great detail, I mean by this a form of individualism which stresses the development of the unique personality; the right of each of us to "do our own thing." This stands opposed to the rather austere, economic individualism of the nineteenth century.<sup>35</sup> But whether this explanation is convincing or not, the tendency in law (and social life) toward plural equality strikes me as absolutely beyond question.

In 1924, less than a lifetime ago, Congress passed a severe and restrictive immigration law, to hold the line against riff-raff from southern and eastern Europe. That was blatantly tilted in favor of white Protestants from northern Europe. That version of immigration law is, as the saying goes, history, along with the laws that excluded Chinese altogether from immigration and citizenship. Even more dramatic is the decline and fall of racial segregation, and racism in general, at least on the formal, legal side. *Plessy v. Ferguson* has been confined to the dungheap of history. A great series of Supreme Court opinions, in the years after *Brown v. Board of Education*, doomed every form of legal segregation. The civil rights laws of the 1960s drew down the curtain on this shameful

<sup>33.</sup> Id. at 83-87.

<sup>34.</sup> LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE (1990).

<sup>35.</sup> For the concept of expressive individualism and other forms of individualism, see ROBERT BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985).

<sup>36.</sup> On the background, see chapter six of THOMAS J. ARCHDEACON, BECOMING AMERICAN (1983).

<sup>37.</sup> On this story, see BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1900 (1993).

<sup>38. 347</sup> U.S. 483 (1954).

episode in American history. The voting rights laws, enacted in 1965, finally made black voting power a reality. Race relations, to be sure, remain anything but smooth; but it is fair to say that the problems of today are qualitatively different from the problems faced as recently as the 1950s.

The civil rights movement has been, in a sense, a model for many other movements demanding a share of power and authority, in a regime of plural equality. Feminism is not a new idea, of course, but the gains of the last generation are more profound, and potentially more revolutionary, than those of prior generations. In the most recent decades, there have been scads of "liberation" movements, and they have achieved significant legal results. States and the federal government alike have produced laws outlawing age discrimination, protecting the disabled, and expanding prisoners' rights. Many victimless crimes, so-called, have been wiped off the books. That randy couple, two consenting adults, can do just about what they please in most states; and for that matter, three, four, or a dozen consenting adults. Prohibition (of alcoholic beverages) came and went; and the public is now free to drink itself, legally speaking, into a total drunken stupor. Many people take advantage of this glorious right.

I have been careful to talk about a *tendency* toward plural equality. There are still battles, great and small, over every single one of the movements mentioned. There are definite signs of backlash and counter-revolution. The public, outraged about crime, seems to support reductions of prisoners' rights, and almost any proposal tougher than what we have is gloriously popular with voters. Recently, some states, in a fit of pique, have even taken television sets away from prisoners. This must strike some people as the ultimate in punishment. Draconian drug laws are still on the books; and getting worse, not better. The Supreme Court drew a line in the sand, in *Bowers v. Hardwick*, <sup>39</sup> and refused to constitutionalize the rights of same-sex couples. Millions of black Americans remain, in effect, segregated and profoundly poor.

Examples could be multiplied. Yet, basically, plural equality and its consequences are here to stay. Whether we go forward, stand pat, or move *slightly* to the rear, is a question I decline to answer, without a crystal ball.

Legalization, too, seems here to stay; and there are no signs that the legal system is about to shrink or become less complex. On the contrary: the scale and scope of modern society breeds law. The legal system is immense, dense, and ubiquitous; and this is unlikely to change. But the sheer amount of law does not mean, as some people imagine, that we are necessarily less free than people in the nineteenth century. Take, for example, the automobile. Free spirits of various types like to curse the automobile, because of the way it ruins the cities, its danger to the environment, and because so many of us are addicted to cars. But cars also bring us unprecedented freedom. With a car, we can come and go as we please, ride in the country, visit distant relatives, live past the end of the trolley-line, travel to Disneyland, and so on. On the whole, the automobile means freedom and opportunity; it opens up horizons that were closed to most people before. Yet it also produces a huge amount of law, and tons of rules and regulations—drivers' licenses, traffic law, safety regulations, highway construction—the list of legal consequences is endless. These rules and regulations, realistically, are not simply detractions from freedom; many of them, on the contrary, are the very condition and

framework of freedom. A similar argument could be made about many other kinds of regulation: rules about safety on passenger airlines, control over the allocation of television channels, and so forth.

In short, complexity and plural equality are responsible for legalization, for the multiplicity of laws that buzz all around us like flies. Whether there is too much law is an open question. But one thing does seem clear: it is simplistic to equate the sheer *mass* of law with loss of true freedom. Village people of the nineteenth century did not need a driver's license; travel was much less "legalized," but it was harsh and difficult. Nobody but the very rich traveled for pleasure. There were no effective food and drug laws in the late nineteenth century; people who sold snake-oil and drug-laced elixirs victimized thousands and poisoned hundreds.

Civil rights laws are another good example of how an increase in legalization may have a positive impact on human liberty. This is a relatively new, and very complicated, field of law. In 1894, nobody dreamed of rules against sex discrimination—let alone the rights of people over forty, or of men and women in wheelchairs. Rules against discrimination are supposed to lay the basis for plural equality, which in turn (most of us think) probably makes for a more just society. Not everybody would agree with this formulation, at least not in an extreme form. Some aspects of discrimination law are hotly contested: affirmative action, for one. But still, not many people, I hope, would want to go back to the segregated world before Brown v. Board of Education; or to a world without ramps for the handicapped, and without job opportunities for women. There was nothing like modern civil rights law in 1894; and there was nothing like the freedom that women and minorities have today, freedom to explore new options; freedoms which, for all their problems, are a national civic treasure. These freedoms would not exist, practically speaking, without the new legislation. And I like to think that white men descended from the old elite are themselves more free because of the general increase in freedom—free in a richer, deeper sense than in the past.

A complex society, in short, must have its rules and regulations. A plural society cannot rest on easy assumptions about what "everybody" thinks or what "everybody" does. Let me take a small example, but one which is pretty close to home: the dreaded LSAT, which began its reign of terror around 1950.<sup>40</sup> In the background was the so-called "GI bill of rights," which gave the veterans of World War II free college educations. Higher education expanded greatly, and it became, for the first time, truly open to men (and a few women) from all walks of life, and strictly on the basis of merit. Before this, rules of admission were much less "legalized" and "formalized;" but in many places they were also based mostly on subjective considerations—who you knew and how much money you had, your class background, your connections, even the way you looked.

The LSAT, in other words, was a step toward a kind of plural equality—an end to a situation in which only the "right sort" of people monopolized the best places in the better schools. Admissions were never totally legalized. Before and after, there was always a lot of affirmative action, to use the modern phrase. But it was not affirmative on behalf of minorities—on the contrary, it was affirmative action for alumni children, children of rich donors, and children from the right prep schools. Even state universities were skewed toward middle class kids who could afford to go away to college. Not many people

during this period of *informal* affirmative action, as far as I know, criticized the system, on the grounds that alumni children or children of the rich who got in to elite schools would be "stigmatized" and feel inferior. (If they felt anything, it was exactly the opposite). Today, there is more red tape, more rules, more legalization, more government regulation in the admission process—but arguably, more social justice, less arbitrariness, and less class bias as well.

The general point is that freedom requires structure, in our kind of society: it requires rules, a framework, order—traffic regulation so to speak. Freedom is not anarchy. It is always limited by social norms and by custom; and it is always bracketed by a bony mass of "law." The law makes freedom possible, protects it, and facilitates its exercise.

This point, of course, should not be misunderstood. I am not defending rules and regulations per se. Many rules and regulations are stupid and counterproductive; no one could or should deny that. Each regulation, each agency or structure should be analyzed, debated, and assessed. But our legalized world, our world of rules and regulations, is both more and less than red tape. Freedom is not the absence of something. It is a positive state of opportunity and open skies. I think we have more of it today than we did in 1894; and that's all to the good.

#### III. INTO THE FUTURE

And what about 2094? What about the bicentennial? We won't be around, and the future is the darkest of all historical mysteries. The one thing we know about the future is that it is absolutely unknowable, even unthinkable—until it comes around. A few cautious predictions about what is likely to happen next month just *might* work out. Beyond that, everything else is science fiction. Our ship drops off into a fathomless abyss.

Still, we can't help wondering, even in this darkness, what people will be saying and doing here, a hundred years from now. I hope there is something here at that time. We are probably not going to blow up the planet, but we might just choke it to death or run out of space.

If human beings survive, if Indiana is still here, if there is a law school, and a banquet and a celebration a century from now . . . how different will it be? Undoubtedly, the guests at that banquet, who look back on the celebrations of 1994, will think of us as quaint, primitive, old-fashioned. We will be very strange to them, very foreign. Of that I am sure. We will be dead leaves, dead data, nothing more; we will be faded old pictures, memories, lifeless objects, like flowers pressed in a book. I wonder if there will even be books at that time. Maybe the whole world of law will be reduced to blips on a screen. Maybe law will be taught by inserting ideas in people's heads through some sort of telepathic process.

So much of what seems natural to us will strike our descendants as . . . well, weird. Our very thought processes will be mysteries to them—something for historians to puzzle over, dope out, explain. It will be a very different world. It might be a better one. I hope so. I hope too that this school will stay around, thriving, striving, improving, doing its job, educating, researching, raising standards, deep into the unknown regions of the years to come.

# BALANCING ACTS: CRISIS, CHANGE, AND CONTINUITY IN AMERICAN FAMILY LAW, 1890-1990

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#### INTRODUCTION

The Symposium to celebrate Indiana University School of Law at Indianapolis's Centennial has given me an opportunity to think broadly about family law over the last hundred years. In contemplating the Symposium theme, "Then, Now and Into the Future," I have been struck by questions of time and timing, and how they affect the way we think about the present, the past, and the relationship between the two. Asked to compare family law in the 1890s and 1990s, I am struck by obvious parallels. Then and now, the widespread conviction that families constituted the bedrock institution of our society made Americans particularly sensitive to what goes on in the nation's homes. Then and now, family change provoked fears that all was not well in the household and thus the republic. Then and now, newspaper stories chronicled rising divorces, juvenile crime, dead-beat fathers, abusive parents, and neglected children. And, then and now, law seemed an inviting arena in which family problems could be addressed. In other words, thinking about the family and its law, the distance between then and now does not seem very great. And yet, of course, in many other ways, family controversies are not the same. Test-tube babies and surrogate motherhood suggest the differences.

Nevertheless, what has struck me the most about a comparison of family law in 1890s and 1990s is not so much the commonality or differences in particular issues or even in the importance placed on family well-being, but rather the persistent way we talk about the complex relationship between families and law. As my contribution to the centennial discussion on law then and now, I want to offer a speculative synthesis suggesting that we have inherited a way of talking about American family law that fundamentally frames our disputes over marriage, divorce, child custody, abortion, and the other contested family questions of our time. I want to argue that at any particular time during the last century, this way of talking about family law highlights certain issues while marginalizing or even silencing others.

This persistent discourse of domestic relations has two critical components. First, we tend to talk about family law problems in metaphoric terms of balancing. Teeter-totter-like, we speak of balancing individual and family rights and autonomy with state interests, legitimation, and regulation. Examples fill every chapter of the domestic relations texts used in classes in 1894 and 1994: the right to wed and the state regulation of marital choices, the right to leave a troubled marriage and the state interests in family preservation, the right to a child and the public interest in child protection, and so forth.

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<sup>1.</sup> For an insightful discussion of the use of such metaphors in family law, see Lee E. Teitelbaum, Family History and Family Law, 1985 WIS. L. REV. 1135. For a useful discussion of literature on legal balancing, see Stephen E. Gottlieb, The Paradox of Balancing Significant Interests, 45 HASTINGS L. J. 825 (1994).

Second, I think that the sides shift in these rhetorical balancing acts because of critical timebound elements that spring from the constant reality of American family diversity. That is, now, as at any moment in the past, there is no single American family. Quite the contrary, there are, and always have been, a wide range of family forms and choices. Debate focuses on the legal standing of these various family forms, and it generally emerges in contests between what I would call functional families and ideological families. Functional families are those various ways women, men, and children actually live together; ideological families are the forms of family life recognized in the public narratives of the law.<sup>2</sup> Public narratives are the official stories embedded in statutes, legal doctrine, administrative directives, and the other dominant forms of public authority. The two do not always coincide, and they often occupy different sides of family law's teetertotter. Clashes over them provoke debate and controversy because they raise the basic questions of family law: What is a legal family? What are the responsibilities of family members to each other and to the community? Who can marry and form a legal family? Who ought to be recognized as a parent? Answers to these questions repeatedly upset the legal balance and spill out into the public sphere. They did in 1894; they do so now.

I want to use a couple of examples to illustrate the character of the dominant domestic relations discourse, and in so doing, suggest some of its implications. I want to do so by briefly outlining the shifting debates about marital choice and child custody over the last hundred years. I think these debates occurred in two distinct timebound moments. In other words, I want to periodize the history of family law over the last century to suggest that the law's dominant discourse had timebound dialects.<sup>3</sup> The first era stretched from the late nineteenth century to about the Great Depression; the second, from the depression into our time. In each era, dominant approaches defined family law by using clashes between functional families and ideological families to set the law's balance and frame lay and professional debate about family regulation. By talking in admittedly general terms about marital choice and custody in these two eras, I want to sketch quite broadly some thoughts on what has changed in family law, what has not changed, and the meaning of both change and continuity.

By adopting a periodized comparison, I will necessarily emphasize difference over similarity. And so before looking at these two eras, I want to add an aside on family law continuity. As evident in my initial simple comparisons of the 1890s and 1990s, continuity as well as change have marked the history of American family law over the last century. What Willard Hurst calls "drift" is always at play in every legal category. Drift, I take to mean the on-going elaboration of dominant legal trends. A catalogue of family law drift is quite lengthy: the legal individualization of family members, the reliance on experts in resolving family disputes, the use and legitimacy of divorce, the codification

<sup>2.</sup> For a helpful discussion of functional families, see Martha L. Minow, Redefining Families: Who's In and Who's Out? 62 U. COLO. L. REV. 269 (1991). For an analysis of public narratives, see Margaret R. Somers, Narrativity, Narrative Identity, and Social Action: Rethinking English Working-Class Formation, 16 Soc. Sci. Hist. 591 (1992).

<sup>3.</sup> I do so in agreement with Peter Stearns that periodization is one of the most significant forms of analysis that historians can contribute to debates about public policy, *History and Policy Analysis: Toward Maturity*, PUB. HISTORIAN 5 (Summer 1982).

<sup>4.</sup> JAMES WILLARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES ch. 5 (1977).

of key family law rules, the bureaucratization of family law institutions, the ever greater segmentation and refinement of domestic relations rules, and the federalization of family law. These trends were evident in 1890, and they are even more visible today. They are clearly critical to the character of family law at any particular time and over time. But I think that in a symposium like this one, selective differences are more revealing than these continuities. In examining these differences, I rely on a central tenet of comparative analysis advanced by French historian Marc Bloch. He argued that the most revealing comparisons proceeded from surface sameness to underlying differences.<sup>5</sup> In terms of family law, I think that both the importance placed on families and the tendency to discuss family law in terms of balancing provided the surface sameness, while the realities of and reactions to family diversity reveal underlying differences between recent eras in family law. In other words, I want to suggest that what is contested, and why, helps us understand the lineaments of family law and better equips us to analyze both legal continuity and change.

### I. FAMILY LAW PATERNALISM

When students began learning the law at Indiana University School of Law in 1894, domestic relations was a relatively new category of American law. Its first major compilation, James Schouler's *Law of Domestic Relations*, had been published only twenty years earlier. Until then, family law had been scattered about the legal landscape. Categorization not only brought rules together, but marked off the family as a particular realm of legal experience.<sup>6</sup> Nevertheless, it was a realm in turmoil. Many of domestic relations law's key doctrines were being contested, revised, and even repealed.

Legal conflict was a flank of the larger social crises of the era. In a time overwhelmed by economic and social upheaval, panic about the family grew. Fear spread that urbanization, industrial capitalism, and massive immigration were undermining the nation's homes and thus, the republic itself. Rising divorces, delayed marriages, shrinking birth rates, growing juvenile delinquency, and the proliferation of family forms fed fears that the family was disintegrating.<sup>7</sup>

These fears resulted in a "moral panic" over the family. That is, a moment in time emerged when widespread fears and anxieties crystallized on a specific object of concern—the family. This moral panic became the single most important source of family law reform. Equally important, during such panics popular fears are often displaced onto folk devils—individuals and groups singled out as particular sources of evil.<sup>8</sup> That is precisely what occurred during this family crisis. Families and family

<sup>5.</sup> For a discussion of Bloch's work, see William H. Sewell, Jr., Marc Bloch and the Logic of Comparative History, 6 HIST. AND THEORY 208 (1967).

<sup>6.</sup> For an analysis of the creation of domestic relations as a legal category, see MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA ch. 8 (1985); Carl Schneider, The Next Step: Definition, Generalization, and Theory in American Family Law, 18 MICH. J. L. REFORM 1039 (1985).

<sup>7.</sup> GROSSBERG, supra note 6, at 9-12.

<sup>8.</sup> For a discussion of moral panics and folk devils, *see* Stanley Cohen, Folk Devils and Moral Panics: the Creation of the Mods and Rockers (1980).

practices outside the majoritarian norm were labeled as deviant and targeted for sanction. Groups of self-proclaimed family savers, like the National League for the Protection of the Family, demanded social order, cultural uniformity, and the maintenance of what they considered traditional values. As Elaine May argues, "Victorians waged a vigorous campaign to bring outsiders into the fold. They used every means of persuasion or coercion within their power to encourage, or even force, conformity to the code."

Many of those means entailed greater state regulation. Assuming a fundamental division between the public and the private, reformers demanded state intervention into what had been considered the family's autonomous decisions about work, education, health, and welfare. Their demands assumed that families should no longer be left as free to govern themselves, and that American households needed both the guidance and the agents of an increasingly therapeutic state. As Marilyn Brady explains:

Declaring a crisis in the American family and a threat to national greatness, some reformers sought to insure that couples would continue to get married, to stay married, and to have as many children as had the couples of a generation earlier. They supported legislation to tie women more closely to the home. In their view, the government needed to step in to save the family from sons and daughters unwilling to duplicate their parents' lives and from those who had always lived outside the middle class.<sup>10</sup>

Law became a critical arena during this moral panic. Charges that nuptial and family diversity undermined the nation's homes led to demands for greater policing of domestic relations. But family law did not merely mirror the social crisis. Instead, as always, an interactive process between law and society made domestic relations both a source and a product of the debates of the period. Family saving was translated into the already functioning discourse of domestic relations. A spate of paternalistic laws and doctrines tilted family law away from individual and family rights toward public regulation. A new public narrative framed debate about family law among litigants, lawyers, judges, and laypeople. Its dominant story line emphasized the need for a more uniform family ideology and the disastrous consequences of recognizing functional families that did not conform to those standards. As a result, family law contests were expressed primarily as battles between a dominant paternalism and a deviant libertarianism.

Consequently, during the years around the law school's founding, family law debate focused on the continued legitimacy of statutes and doctrines from the antebellum era that had generally tolerated, if not actually fostered, family diversity. From the creation of common law marriage and the granting of inheritance rights to illegitimate children to the limited restrictions on abortion and the conferral of property rights on married women, family law created in the years from the American Revolution to the Civil War tended to legitimate functional families. The law's public narrative, in other words, was generally inclusive rather than exclusive. It projected multiple images of legitimate families and

<sup>9.</sup> Elaine T. May, Great Expectations: Marriage and Divorce in Post-Victorian America 21 (1980).

<sup>10.</sup> Marilyn D. Brady, *The New Model Middle-Class Family, in* American Families: A Research Guide and Historical Handbook 106 (Joseph M. Hawes & Elizabeth I. Nybakken eds., 1991). *See also* Robert L. Griswold, Fatherhood in America: A History 31-32 (1993).

family members.<sup>11</sup> The moral panic experienced by countless turn-of-the-century Americans eroded the confidence critical to that tolerant family law. Instead, reaction set in and upset the law's balance. As this school was founded, reaction was at high tide. We can see its effects in the way people of the period talked about the law of marriage and custody.

## A. Marriage

Demands for greater regulation of marriage topped the agenda of family savers. Fearing the social consequences of marital failure, they wanted to preserve the family by limiting the marital freedom secured during the antebellum era. Law framed their efforts. "A good marriage code," sociologist George Howard argued in 1910, "tends to check hasty, clandestine, frivolous, and immature wedlock. A bad marriage law favors such unions, which so often end in divorce court."12 The triumph of a participant run marriage system based on individual choice and romantic love had helped spawn the tolerant marriage code now under attack.<sup>13</sup> Agitation for regulation challenged that toleration with the assertion that getting married should be considered less of a private and more of a public matter. The demand had clear sources in both popular and legal practice. Continuing earlier practices, countless individuals in the late nineteenth and early twentieth centuries claimed the right to wed persons of their choice and to gain legal recognition for their unions. The most dramatic, and most successful, example occurred in the post Civil War South as thousands of freed slaves roamed the countryside to reunite broken families and cover extra-legal slave unions with law.<sup>14</sup> Individual crusades like this one had utilitarian and symbolic goals. Marriage gave couples property, residential, and other rights; it also secured the public stamp of approval for their unions. And for the same reasons, denial barred couples from those legal privileges and symbols of public acceptance. Denial became the dominant discourse of the day. It tilted the balance in the law away from an earlier emphasis on individual choice and marital pluralism toward new expressions of state regulation and nuptial uniformity.

One individual crusade for marital freedom led to the most important and most telling judicial invocation of public matrimonial authority in *Maynard v. Hill.*<sup>15</sup> David S. Maynard, a founder of the State of Washington and the city of Seattle, wanted to rid himself of his first wife. The territorial legislature of Oregon, which had jurisdiction over what would become Washington state, complied. When the United States Supreme Court later confronted a challenge to the legitimacy of that act, Justice Stephen Field responded with a ringing endorsement of state regulatory authority over marriage:

<sup>11.</sup> These points are drawn generally from GROSSBERG, *supra* note 6. As in so much of American law, race was the major exception to this trend. The ban on slave marriage was the most grievous denial of marital freedom in the era.

<sup>12.</sup> Quoted in GROSSBERG, supra note 6, at 85.

<sup>13.</sup> See Karen Lykstra, Searching the Heart: Women, Men, and Romantic Love in Nineteenth Century America (1989).

<sup>14.</sup> See LEON LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY ch. 5 (1979).

<sup>15. 125</sup> U.S. 190 (1888).

It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. <sup>16</sup>

Maynard expressed the changing tenor of debate about marriage in the era. Still considered a "civil contract," the legal emphasis shifted from the second word to the first. As Walter O. Weyrauch and Sanford Katz explain, "[t]he case is cited in the context of constitutional attacks on legislation having an impact on marriage . . . . In actual practice, consequently, Maynard can be cited whenever an argument in support of the police power of the state to regulate marriage is made."<sup>17</sup>

The major legal debates about marriage took place in the states, which retained primary control over domestic relations. Legislators took the lead in trying to change the law's balance. They drafted marriage codes that sought to stifle marital diversity by making it harder to wed. By the 1920s, every state had revised its law to impose greater controls on the right to marry. The new codes limited both who could wed and whom a person could wed, and thus denied legitimacy to functional families that considered the unions that created them legitimate.

Though there were significant jurisdictional variations, marriage law reform included a number of common features and common themes. George Howard, for instance, expressed the breadth of the shifting emphasis in marriage law when he campaigned against retention of the traditional nuptial ages of twelve for females and fourteen for males. "Majority is the law's simple device for securing mental maturity in the graver things of life," he argued. "Is not wedlock as serious a business as making a will or signing a deed?" As a result of such arguments, states gradually raised the age of consent to marriage, most commonly to sixteen for females and eighteen for males.

Even more telling were nuptial restrictions inspired by the transmission of disease. A major legal departure, they arose from a new assumption that physical defects in

<sup>16.</sup> *Id.* at 210-11.

<sup>17.</sup> WALTER O. WEYRAUCH & SANFORD N. KATZ, AMERICAN FAMILY LAW IN TRANSITION 59-60 (1983). See also Stephen H. Hobbs, In Search of Family Value: Constructing a Framework for Jurisprudential Discourse, 75 MARQ. L. REV. 529, 544-56 (1992).

<sup>18.</sup> Quoted in Fred S. Hall & Elisabeth W. Brooke, American Marriage Laws in Their Social Aspects: A Digest 18 (1919). See also Frederic J. Stimson, American Statute Law: An Analytical and Compared Digest 665-66 (The Boston Book Co. 1886); Anne G. Spencer, The Age of Consent and Its Significance, 49 Forum 406 (1913).

themselves abrogated nuptial rights because the state was obliged to defend itself against unhealthy offspring and the pollution of the marriage bed by disease. In 1910, political scientist Frederic Stimson pinpointed the essence of the change: "To-day we witness the startling tendency for the State to prescribe whom a person shall not marry, even if it does not prescribe whom they shall. The science of eugenics . . . will place on the statute books matters which our forefathers left to the Lord." 19

The eugenics crusade, which crested between 1885 and 1920, had a direct and longlasting effect on marriage law. It helped tilt the legal balance toward regulation and uniformity. Under the sway of eugenic beliefs, restraints on individuals afflicted with mental and physical maladies reoriented the traditional physiological impediments to matrimony. The additions ensured that nuptial prohibitions contained explicit medical as well as contractual means of assessing nuptial fitness. By the 1930s, forty-one states had enlarged the common law tests of mental capacity for marriage with statutes that used the terms "lunatic," "feebleminded," "idiot," and "imbecile" to deny marital rights. The acts, and complementary judicial opinions, indicated a determination in this era to abrogate the common law defense of contractual nuptial rights in reaction to a perceived biological threat to families and public safety. As the Connecticut Supreme Court declared in 1905:

Laws of this kind may be regarded as an expression of the conviction of modern society that disease is largely preventable by proper precautions, and that it is not unjust in certain cases to require the observation of these, even at the cost of narrowing what in former days was regarded as the proper domain of individual right.<sup>21</sup>

Similar fears spawned the creation of venereal disease testing requirements for brides and grooms. In 1913, Wisconsin became the first state to require that prospective grooms submit to medical tests. Rebuffing challenges that the act interfered with religious freedom and unreasonably restrained individual rights, the state supreme court upheld the law and declared that "[s]ociety has a right to protect itself from extinction and its members from a fate worse than death." Despite complaints about unreliable tests and continued charges that they violated individual rights, other states followed suit. Disease-inspired fears, improved detection, greater documentation, and growing popular faith in therapeutic regulation helped make prenuptial medical examinations standard American experiences. And to emphasize the point, by the 1930s, over twenty-six states and territories had imposed criminal penalties on those who wed while infected.<sup>23</sup>

<sup>19.</sup> Frederic J. Stimson, Popular Law-Making: A Study of the Origin, History, and Present Tendencies of Law-Making by Statute 327 (1910).

<sup>20.</sup> See 1 CHESTER VERNIER, AMERICAN FAMILY LAWS 190-95 (1931); Sydney Brooks, Marriage and Divorce in America, 84 FORT. REV. 329, 333 (1905); Eugenic Marriage Laws, 105 OUTLOOK 342 (1913).

<sup>21.</sup> Gould v. Gould, 61 A. 604, 605 (Conn. 1905).

<sup>22.</sup> Petterson v. Widule, 147 N.W. 966, 968 (Wis. 1914).

<sup>23.</sup> FRED S. HALL, MEDICAL CERTIFICATION FOR MARRIAGE: AN ACCOUNT OF THE ADMINISTRATION OF THE WISCONSIN LAW (1921); FRED S. HALL & MARY RICHMOND, MARRIAGE AND THE STATE 58-63 (1929). See also 1 VERNIER, supra note 20, at 199-203; Charles H. Haberich, Venereal Disease in the Law of Marriage and Divorce, 37 Am. L. Rev. 226 (1903); Jacob Lippman, The Sexual Aspect of Juridical Marriage, 65 Am. L.

Sterilization, the most extreme eugenic measure, crowned the campaign to curtail the nuptial freedom of the unfit. By permanently preventing the mentally, physically, and morally defective from procreating, reformers hoped to allow these unfortunates to rejoin society and enjoy the solace and controls of matrimony. By 1931, twenty-seven states had enacted some form of mandatory sterilization. Despite fierce debate over the legitimacy of the acts, sterilization received the imprimatur of the Supreme Court in 1927, when Justice Oliver Wendell Holmes, Jr. approved the sterilization of eighteen year old Carrie Buck, a mentally impaired Virginia woman. Voicing the fears of the day and the determination to tilt the law toward greatly increased public surveillance of marriage, Holmes declared, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."<sup>24</sup>

The most direct attack against functional marriages came in challenges to the legitimacy of common law marriage. A creation of the antebellum era, common law marriage allowed couples to form their own binding unions without benefit of formal ceremonies and in defiance of state marital regulations. It became the symbol of regulatory laxity for those who feared marital freedom and nuptial diversity. Reformers charged it with spawning social anarchy and untrammeled individualism, and they dismissed pleas that common law marriage protected children from illegitimacy and women from sexual exploitation. Such sentiments had been convincing in the previous period, but now they went unheeded. Instead, reformers contended that common law marriage protected the disreputable acts of an immoral minority and bred blackmail, fraudulent estate claims, and sexual license. Demanding a new legal balance that would deny legality to such unions, Howard claimed:

In no part of the whole range of human activity is there such imperative need of state interference and control as in the sphere of the matrimonial relations. In this field as in others we are beginning to see more clearly that the highest individual liberty can be secured only when it is subordinated to the highest social good.<sup>25</sup>

By the end of the 1920s, the states were evenly divided between those who allowed common law marriages and those who forbade them. At the same time, laws requiring a marriage license steadily spread. By 1932, all but three states required licenses.<sup>26</sup>

Complementary changes in divorce law also helped rephrase marital debates. Responding to the fact that the United States had the highest divorce rate in the world, state legislatures tried to stem the tide by making it more difficult to end a marriage. Reform emphasized marital permanence with the enactment of restrictions on remarriage after divorce, longer residence requirements, and reduced grounds for divorce. Equally important, divorce statutes retained the commitment to the fault standard. A marriage

REV. 136 (1931).

<sup>24.</sup> Buck v. Bell, 274 U.S. 200, 207 (1927). *See also* Mark S. Haller, Eugenics; Hereditarian Attitudes in American Thought 130-41 (1963).

<sup>25. 3</sup> GEORGE HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 184 (1904).

<sup>26.</sup> Otto E. Koegel, Common Law Marriage, 4 FAM. 172 (1923); Fred S. Hall, Marriage and the Law, 160 MODERN AM. FAM., ANNALS 110-15 (1932).

would be terminated only when a spouse was proven to have committed a serious matrimonial crime. Such a tilt in divorce law echoed the new balance in marital reform.<sup>27</sup>

The relationship between the era's dominant domestic relations discourse and marriage law reform was quite clear. The two united to declare that the law ought to assert uniform ideas of legitimate marriages to an increasingly diverse populace. As a result, the law broadcast a more precise and uniform ideological conception of fit marital partners than ever before.<sup>28</sup> Though much of the new code became widely accepted, almost every aspect of it was contested and often with success in many jurisdictions. However, those contests took place within a debate framed by the opposition to diversity.

The tilt toward regulation put defenders of marital freedom on the defensive. Yet, as the balance metaphor suggested, the minority always retained a place in the debate, and their voices were heard. Indeed, many states retained vestiges of the old system. For example, in 1930, twelve states still retained the traditional Anglo-American marriage ages of fourteen for males and twelve for females, and only twelve states required as much as a five-day waiting period between application for a marriage license and performance of the ceremony. Tellingly, the "Marriage and Marriage License Act" proposed by Commissioners on Uniform State Laws in 1907 had only been adopted in Wisconsin and in modified form in Massachusetts by 1930. By 1932, only fourteen states had time limits restricting hasty marriages. Equally important, the courts continued their established policy of refusing to declare marriages void because a statutory rule had been violated.<sup>29</sup> Nor did the changes fostered by the rephrased debate stem the rising divorce rate or eliminate marital experimentation. In fact, one development of the age, the tendency of well-educated women to delay or even forego marriage, was simply beyond the law's reach.<sup>30</sup> Equally significant, between 1870 and 1920, the number of divorces granted nationwide increased fifteen fold. By 1924 one marriage out of every seven ended in divorce. Legal restrictions made little difference when many couples were willing to participate in a charade to meet legal requirements for divorce in order to liberate themselves from unsatisfying marriages.<sup>31</sup> The trend in judicial interpretation, however, was to dilute stringent legal statutes. In 1931, only seven states specifically permitted divorce on the grounds of marital cruelty, but judges in most other jurisdictions broadly interpreted laws permitting divorce on grounds of cruelty to encompass expansive notions of mental cruelty. Such individual and institutional actions expressed a continuing commitment to nuptial freedom and to the recognition of nuptial diversity and

<sup>27.</sup> On the relationship between marriage and divorce, see Lenore J. Weitzmann & Ruth B. Dixon, The Transformation of Marriage Through No-Fault Divorce: The Case of the United States, in MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES 143 (John M. Eekelarr & Sanford N. Katz eds., 1980).

<sup>28.</sup> On these general changes, see GROSSBERG, supra note 6, at chs. 3-4.

<sup>29.</sup> HALL & BROOKE, *supra* note 18, at 18-21; Joseph H. Beale et al., *Marriage and the Domicil*, 44 HARV. L. REV. 501 (1930-31). *See also* 1 VERNIER, *supra* note 20, at 15. *See generally* HALL & RICHMOND, *supra* note 23.

<sup>30.</sup> See Brady, supra note 10, at 105.

<sup>31.</sup> STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 109-10 (1988).

functioning marriages. These lay and professional actions kept the law from tilting even more toward restriction.<sup>32</sup>

But those who continued to champion marital freedom also faced sanctions for their deviancy. Two groups incurred formal ostracism as "folk devils"—interracial couples and Mormon polygamists. They became the "Other" of marriage law: persons used in family law debates to define unwanted marital partners and unwanted marriages. Both groups also incurred the greatest state sanctions of the period. Pushed to the margins, their fate illustrates the tenor of marriage law debates in the era.

Bans against interracial marriage proliferated in the South and West and some Midwestern states. From 1880 to 1920, when white racial phobia reached unprecedented heights, twenty states and territories strengthened or added antimiscegenation laws. Moreover, though five states had repealed the ban during the 1880s, none did so from 1890 to 1920.<sup>33</sup> Racism combined with new eugenic fears to support curbs on individual marital choice. The Virginia statute, for example, justified the ban because it "preserved the racial integrity of its citizens" and prevented "the corruption of blood," a "mongrel breed of citizens," and the "obliteration of racial pride." By 1910, Harvard Professor Frederic Stimson declared: "Marriage may be forbidden or declared null between persons of different races, and the tendency to do so is increasing in the South, and is certainly not decreasing in the North. Indeed, constitutional amendments are being adopted and proposed having this in view, 'the purity of the races.'"35 That same year, in his widely read study of the color line, muckraker Ray Stannard Baker explained the popular prejudices that undergirded the ban: "Although there are no laws in most Northern states against mixed marriages, and although the Negro population has been increasing, the number of marriages is not only not increasing, but in many cities, as in Boston, is decreasing. It is an unpopular institution."<sup>36</sup> Almost two-thirds of the nation codified its unpopularity.

By 1916, twenty-eight states and territories prohibited some form of interracial marriage, creating the most racist nuptial code in American history. And the ban produced the widest number of marital restrictions. Laws protected racial purity by banning the marriage of whites with African-Americans, Asians, and Native Americans. Recognizing the legality, indeed the legitimacy, of interracial unions would, in the view of many white critics, have offered at least tacit support for racial and social equality in domestic relations. As racial segregation became even more inflexible with the appearance of "Jim Crow" laws, marriage was singled out for the most stringent restrictions. More states banned interracial marriage than any other form of racially related conduct. A 1910 study of racial discrimination categorically labeled the ban as the one restriction "which has not been confined to the South, and which has, in a large measure, escaped the adverse criticism heaped upon other race distinctions." <sup>37</sup>

<sup>32.</sup> Id. at 109-10, 127.

<sup>33. 1</sup> VERNIER, supra note 20, at 204-09.

<sup>34.</sup> STIMSON, supra note 19, at 313.

<sup>35.</sup> Id.

<sup>36.</sup> Quoted in Charles S. Magnum, Jr., The Legal Status of the Negro 99 (1940).

<sup>37.</sup> GILBERT T. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 78 (1910). See also FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 79 (1942); GROSSBERG, supra note 6, at 136-40; Note,

At the same time, the greatest use of federal power in nineteenth century domestic relations law occurred with the campaign to eliminate polygamy among the Mormons, the last major remnant of antebellum utopians like the Shakers and the followers of John Humphrey Noyes who had experimented with marital forms. Polygamy kindled a bitter national debate that tested the legal commitment to monogamy, and family savers responded in kind. Upset at the ineffectiveness of statutory attempts to stifle the practice, President Ulysses S. Grant complained of the failure to destroy what he termed a "remnant of barbarism, repugnant to civilization, to decency, and to the laws of the United States." Congress responded in 1874 with the Poland Act which increased federal control over territorial courts and juries in Utah by limiting the procedural rights of indicted Saints. 39

The first major legal test of the campaign came four years later in *Reynolds v. United States.*<sup>40</sup> Chief Justice Morrison R. Waite eliminated the one foundation on which an alternative to monogamy might have received constitutional protection: the right to religious liberty. While fully subscribing to the constitutional prohibition on persecuting individuals for their religious beliefs—which he termed "opinion"—Waite ruled that Congress could punish subversive and antisocial "acts." He labeled polygamy "an odious practice" and rejected Reynolds' attempt to have it classified as a constitutionally protected theological belief. The Chief Justice used revealing analogies to make his point and underscore the folk devil status of the Mormons:

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?<sup>41</sup>

Waite also relied on the traditional Anglo-American prohibition of bigamy to denounce plural marriage as illegal and un-American. Furthermore, he endorsed a broad definition of state nuptial authority by placing it "within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." To permit plural marriage, he concluded, would "make the professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself." The court would not accept such an extension of nuptial freedom.

Reynolds cleared the way for a renewed assault on the Mormon theocracy. Further congressional legislation, most notably the Edmunds-Tucker Act of 1887, hobbled the Saints by criminalizing cohabitation with more than one woman, banning advocates of

Intermarriage with Negroes—A Survey of State Statutes, 13 VA. L. REG. (n.s.) 311, 311-12 (1927).

<sup>38.</sup> Quoted in IX A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4105 (James D. Richardson ed., 1897).

<sup>39.</sup> Poland Act, ch. 469, § 4, 18 Stat. 253, 254-55 (1874).

<sup>40. 98</sup> U.S. 145 (1878).

<sup>41.</sup> *Id.* at 166.

<sup>42.</sup> *Id*.

<sup>43.</sup> Id. at 167.

polygamy from juries, authorizing the annulment of the incorporation of the Mormon church and the confiscation of its assets, and imposing test oaths of opposition to polygamy for territorial citizens. Congress rejected attempts at statehood to retain its power over the sect. In 1885, the Supreme Court endorsed much of the legislative assault with the declaration that the cohabitation of a man and more than one woman is not a lawful substitute for the monogamous family which alone the statute tolerates. Sy the time this law school was founded, the campaign was at its zenith. Criminal prosecutions of almost 1300 Saints, financial destruction, and promise of continued federal and local assaults overcame the Saints' resistance. The Mormon leadership renounced polygamy, and with a constitutional ban, Utah finally achieved statehood in 1896.

The battle with the Mormons allowed the American legal system to arm itself with unusual power to enforce the majoritarian allegiance to monogamy. In a society increasingly obsessed by fears about family life, polygamy came to be seen as such a monumental menace to the nation's households that it encouraged an unparalleled federal intervention into the internal governance of a territory. Charles S. Zane, who had presided over many polygamy trials as a federal judge, explained why in the 1891 *Forum*: "The immediate effects of the law often appeared very sad, and, to justify it, it was necessary to look away, and ahead to a social system with a family consisting of one husband and one wife and their children, and the affections that arise from such relations." "46"

Women and men who entered interracial and polygamous marriages became the folk devils of marriage reform because they were depicted as the most extreme consequences of marital freedom. As folk devils they were used repeatedly to legitimate the new ideological conception of marriage that tilted the law toward restrictive regulations.

# B. Custody

Domestic relations' dominant discourse also framed debates about custody law during the years surrounding the law school's founding. The moral panic engulfed all discussions of family law, including the rules governing parents and children. Concern about disorder in the nation's families flowed not just from mounting fears about marriage, but also from evidence of high rates of infant mortality as well as child abuse, delinquency, and neglect. And critically, anxiety arose amidst what Viviana Zelizer calls the "sacralization" of children, a view of children emphasizing their economic uselessness and their emotional pricelessness. Child labor, for instance, seemed to violate both childhood innocence and degrade their sentimental worth. 47 Calls for greater regulation

<sup>44.</sup> Edmunds-Tucker Act, ch. 397, §§ 1, 2, 26, 24 Stat. 635, 635-41 (1887) (repealed 1978).

<sup>45.</sup> Cannon v. United States, 116 U.S. 55, 72 (1885).

<sup>46.</sup> Charles S. Zane, The Death of Polygamy in Utah, 12 FORUM 368, 371 (1891-92). See also GROSSBERG, supra note 6, at 120-26; Carol Weisbrod & Pamela Sheingorn, Reynolds v. United States: Nineteenth Century Forms of Marriage and the Status of Women, 10 CONN. L. REV. 828, 828-58 (1978). For a Mormon view of the conflict, see EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE-COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900, Pt. II (1988).

<sup>47.</sup> VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD, THE CHANGING SOCIAL VALUE OF CHILDREN chs. 1-3 (1985).

of parenthood echoed demands for marriage reform. Self-described child-savers heeded those calls. As Brady contends:

Homeless, orphaned, and neglected children caught their attention. Inspired by images of family life gone awry, these reformers joined the temperance movement, campaigned for 'moral purity,' and promoted 'voluntary motherhood.' The drunkard and his family, the seducer of the prostitute, and the parents who sent their children into factories to work all seemed to require government intervention. Some reformers believed that the government should step in to enforce the rights of wives and children and protect them from abuse by husbands and fathers.<sup>48</sup>

Like the marriage crusade, demands for greater policing of the nation's homes found legal translations in calls for rearranging the balance between family autonomy and state regulation. And, a tilt toward greater public regulation expressed a determination to limit family diversity and more precisely define a fit parent. Paternalism became the basic theme in discussions about the law of parent and child. Robert Griswold explains the complications of the era's state paternalism by suggesting that:

Reformers at the turn of the century sought to preserve the family as an economically private unit of breadwinning fathers and home-centered mothers. In short, the image of a state invasion of the family obscures rather than clarifies what took place. The state intervened not to undermine the family, but, rather, to foster its economic independence and its functional interdependence. It could not do so, however, without impinging on the power of *individual* husbands and fathers.<sup>49</sup>

A series of paternalistic laws from bans against children joining the circus to compulsory school laws followed from the determination to impose uniform standards on families.<sup>50</sup>

Child custody became a critical subject in these dialogues. Most critically, the tilt toward paternalism, ironically, helped make maternal preference the dominant public narrative of custody law. The power of maternalism in the period flowed from the reality, as Molly Ladd-Taylor has argued, that motherhood "was a central organizing principle of Progressive-era politics." As she makes clear in a study of welfare reforms of the era such as mothers' pensions:

The persuasive appeal of maternalism as a political movement of Anglo-American women in the Progressive era is precisely what now seems its weaknesses: the presumption of gender difference and the repression of diversity. Despite the differences among them, all maternalists believed that

<sup>48.</sup> Brady, *supra* note 10, at 104. For an overview, *see* Susan Tiffin, In Whose Best Interests? Child Welfare Reform in the Progressive Era (1982).

<sup>49.</sup> GRISWOLD, supra note 10, at 57.

<sup>50.</sup> For a discussion of the era, see Michael Grossberg, Children's Legal Rights? A Historical Look at a Continuing Legal Controversy, in CHILDREN AT RISK IN AMERICA 119 (Roberta Wollons ed., 1993).

<sup>51.</sup> MOLLY LADD-TAYLOR, MOTHER-WORK: WOMEN, CHILD WELFARE, AND THE STATE, 1890-1930 at 43 (1994).

women were more nurturing and sensitive to children than men and that the welfare of children—and therefore the future of the nation—depended on the preservation of the home. At a time of increasing heterogeneity in family styles and childrearing practices, both sentimental and progressive maternalists clung to a singular conception of family life. Elite white women, who despite their privileges were denied political, economic, and legal rights equal to men of their class, saw in the defense of 'home' and 'motherhood' a promising source of dignity and power.<sup>52</sup>

Maternalism became the watchword of custody law. It forced a rephrasing of the custody law's central doctrine: the best interests of the child rule. A creation of antebellum judges, the doctrine has always been fundamentally indeterminate. It demanded that judicial decisions further a child's best interests. By doing so, it ceded judges wide discretionary power to define those interests and to evaluate parental fitness accordingly. The doctrine turned custody hearings into narrative competitions in which individual mothers, fathers, and guardians told stories that tried to discredit their adversary's parental care while embellishing their own.<sup>53</sup> And it forced judges to balance their conceptions of children's interests with their notions of parental rights and state authority. Maternal preference simplified these contests by providing a new dominant story line. Compelled to accept the reality that some families would not conform to the ideologically preferred household of mother, father, and children, custody law debates focused on family saving through the imposition of maternalist policies on all types of families and the creation of uniform standards of mothering.<sup>54</sup>

Defining parenting ever more precisely as a maternal duty tilted the debate against diversity with a new balance produced by maternal preference. Fathers, of course, felt the brunt of a maternalist definition of the best interests of the child. The longstanding Anglo-American story line that granted fathers superior custody rights succumbed to the new tale as the balance of the law tilted toward uniformity. As Griswold noted, "The language of science and expertise had been appropriated in ways that left fathers ever more irrelevant to the rearing of their own children. Motherhood was increasingly seen as a science, fatherhood a seldom discussed art." By the end of the nineteenth century, mothers received custody in more than ninety percent of contested cases and, most likely, in informal custody arrangements as well. Fathers, whose parental skill and legitimacy had been challenged since the early nineteenth century, had been discredited as child-rearers and reduced in law to a second, and far less preferable, parent. Indeed, single fathers were labeled as deviant. That process occurred most clearly in the skyrocketing

<sup>52.</sup> *Id.* at 201. *See also* TheDa Skocpol, Protecting Soldiers and Mothers: The Political Origins of the Social Policy in the United States Intro., ch. 8 (1992).

<sup>53.</sup> On trials as narrative competitions, see Lawrence M. Friedman, Law, Lawyers, and Popular Culture, 98 YALE L.J. 1559 (1989).

<sup>54.</sup> MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 118-19 (1994).

<sup>55.</sup> GRISWOLD, supra note 10, at 32.

<sup>56.</sup> WILLIAM GOODE, AFTER DIVORCE 29 (1956).

divorce cases of the era. As divorces escalated at an increasingly rapid rate, maternal custody became a critical family law policy.

Institutionalized through doctrines like the tender years rule, which decreed that infants and young children needed a mother's care and thus custody, maternalism provided the dominant definition of parental fitness in this onslaught of cases. For example, a Wisconsin judge decreed in 1921 that:

For a boy of such tender years nothing can be an adequate substitute for mother love—for that constant ministration required during the period of nurture that only a mother can give because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love.<sup>57</sup>

An Arkansas case the next year revealed the extent of the judiciary's maternalistic commitments. It dealt with the conduct of Mrs. Crabtree, who had almost murdered her husband by cutting his throat with a razor blade, slicing through his fingers, and stabbing him in the back. Nevertheless, the state supreme court separated spousal and parenting rules to declare, "It does not follow that, because the wife tried to kill him in a fit of anger, she did not have any parental affection for the children. On the contrary, the record discloses that she loved them and was properly caring for them." 58

Nor was maternal preference merely a judicial creation. Legislators codified the new tilt in custody law. Equal custody and guardianship rights had been a goal of the women's rights movements since the first convention in Seneca Falls in 1848. Yet only in this era did it succeed. By 1936, forty-two states granted mothers equal rights to their minor children. Though most of the acts did not formally adopt maternal preference, by abolishing superior paternal rights and demanding that judges be guided by the best interests of children they ensured that most mothers who conformed to judicial expectations of proper parents received custody. In this way, custody law promoted family uniformity by making mothers the primary parents of the young.<sup>59</sup>

The new tilt in custody law toward maternalism also encouraged judges and legislators to break the age-old Anglo-American bond between maintenance and custody. No longer conceived as mutually dependent rights, support became a separate paternal obligation. Though difficult to collect, the policy was justified by claims that it enhanced the work of mothers while forcing men to do their duty. By the mid-1930s, forty-six states had passed separate laws criminalizing desertion and nonsupport. Twenty of them declared failure to support a misdemeanor, fourteen a felony punishable by a year or more in state prison, and the other states simply labeled nonsupport a crime. <sup>60</sup> Unwed fathers bore much of the brunt of the new policy. Dismissed out of hand as fit parents, their obligations to support increased. <sup>61</sup>

Maternalist custody framed debates about the legitimacy of all functional families in the era, not just households engulfed in custody contests between divorcing or unwed parents. New domestic relations institutions such as juvenile courts and family courts

<sup>57.</sup> Jenkins v. Jenkins, 181 N.W. 826, 827 (Wis. 1921).

<sup>58.</sup> Crabtree v. Crabtree, 242 S.W. 804, 808 (Ark. 1922).

<sup>59. 4</sup> VERNIER, supra note 20, at 18.

<sup>60. 4</sup> VERNIER, supra note 20, at 66-86.

<sup>61.</sup> MASON, supra note 54, at 56.

used custody to impose uniformity on the nation's diverse homes. Child-savers paid particular attention to the offspring of the immigrant and working class. As Herbert Jacob argues:

[A] public law of child welfare became imposed on the poor that brushed only lightly upon intact, mainstream families. These latter were governed by a private family law which less frequently was the object of legislation, but developed instead through private agreements and the decisions of courts in individual divorce cases.<sup>62</sup>

In doing so, domestic relations law reinvigorated what Jacobus ten Broek has called the dual system of family law: liberationist policies for middle and upper classes, and repressive policies for the lower classes and for racial and ethnic groups.<sup>63</sup> In that vein, a Minnesota juvenile court judge declared:

I believe in this kind of court . . . [i]t is to reach the boy and teach him to follow in the correct line . . . and if need be, to take him from an immoral and vicious and criminal environment, even if it takes him away from his parents, that he may be saved, even though they may be lost.<sup>64</sup>

As a result, custody law retained its longstanding role as a monitor of families. This made maternal preference a doubled-edged phrase. It brought functioning families headed by mothers greater legal recognition, while simultaneously sanctioning constant monitoring or even removal if those women failed to meet the stringent standards of motherhood. Consequently, as Mary Ann Mason has suggested:

Social reformers affirmed the family as the appropriate vehicle for raising children and assisted some mothers in retaining custody of their children. Yet, child welfare workers, acting as agents of the state, also intervened in families and took away children from parents they considered unfit. It is here that the middle-class American-born orientation of the social reformers was most apparent. There was little tolerance of cultural, ethnic, or class differences, particularly when it came to alcohol or what was considered immoral sexual behavior. Single mothers were the main beneficiaries of social and economic support, but they were also the disproportionate target of social worker intervention and removal of children. In part this was because single mothers, as in previous eras, were still more vulnerable to losing their children because of their inability to support them. But it was also because mothers were held to a high standard of sexual morality and the lives of poor single mothers were clearly exposed to social workers.<sup>65</sup>

<sup>62.</sup> HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 129-30 (1988).

<sup>63.</sup> JACOBUS TEN BROEK, FAMILY LAW AND THE POOR: ESSAYS (Joel F. Handler ed., 1971).

<sup>64.</sup> Quoted in David J. Rothman, Conscience and Convenience: The Asylum and Its Alternatives in Progressive America 223 (1980) (emphasis in original).

<sup>65.</sup> MASON, supra note 54, at 100-01.

In this way, the tilt in custody law made custodial determinations tools to reshape these families as did innovations of the era like mothers' pensions. Where, for example, judges often refused to use sexual improprieties to deny custody to middle class women, poor women and women of color often faced such restrictions. In 1920, for instance, Anola Green, an African-American woman in Washington D.C., could not keep her three children unless she forced her lover to leave. Women like Green became the folk devils of custody law. They were used as examples to proclaim the necessity of uniform conceptions of mothers. In this way, custody law became a way judges and other officials policed family deviancy and tried to limit family diversity. The result was to embed maternalism as the dominant public narrative of custody law and thus broadcast an ideologically defined mother as the law's singular image of a fit parent.

The legal paternalism evident in marriage and custody law was echoed in every branch of family law during these years. It framed the discourse on everything from abortion to juvenile justice. Though resisted, the effect was to tilt the law's balance toward stricter and more restrictive state regulation in an effort to stifle family diversity by denying legal support to many functional families.

#### II. FAMILY LAW LIBERATION

Beginning in the twenties and thirties family law debates began to change. As the commitment to family uniformity and extensive state regulation waned, a new concern for individual rights and a new tolerance for family pluralism began to be heard. Most importantly, a growing diversity of family forms challenged the inherited ideological conception of the household that had been embedded in domestic relations laws. In 1991, Steven Mintz reported that "[a]s recently as 1960, 70 percent of all American households consisted of a breadwinner father, a housewife mother, and their children. Today, fewer than 15 percent of American households [fit that pattern]." The rise of egalitarian legal practices and beliefs strengthened calls for change.

The new dialogue provoked questions about the continued legitimacy of the balance in family regulation inherited from the previous era. By the 1950s, numerous attempts had begun to liberate individuals and families from the paternalism of the previous era. They proceeded from new claims voiced in terms of individual rights, autonomy, and equality. Organized in a different fashion than the earlier family saving campaigns and using different tactics, particularly a reliance on litigation, new groups forced a change in family law debates. Indeed, as in the antebellum era, courts became the major forum for debates about family governance.<sup>69</sup>

<sup>66.</sup> LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON, 1880-1960 at 131-32 (1989).

<sup>67.</sup> For analyses of these trends, *see* GROSSBERG, *supra* note 6, at chs. 6-7; MASON, *supra* note 54, at ch. 3.

<sup>68.</sup> Steven Mintz, New Rules: Postwar Families, in AMERICAN FAMILIES: A RESEARCH GUIDE AND HISTORICAL HANDBOOK 184 (Joseph M. Hawes & Elizabeth I. Nybakken eds., 1991).

<sup>69.</sup> For a discussion of the family changes and conflicts of the era, see MINTZ & KELLOGG, supra note 31, at chs. 7-10.

As before, the era's domestic relations debates were framed by its dominant discourse. Calls for change became voices arguing that the law's balance had tilted too far the wrong way. Inherited family law rules emphasized restrictive regulation and uniformity, when they ought to promote individual choice and the recognition of a wide array of functioning families. The new debate was fueled as well by the reality that family disputes, especially divorce, now dominated many trial court dockets. By the 1980s, almost half of court business involved domestic relations. Equally distinctive, in a shift from the state and legislative locus of the previous debates, federal appellate courts became central sites for contention and change during the period. In a series of dramatic decisions, federal judges revised the discourse of domestic relations by expanding the law's definition of a family.

Cases like Moore v. East Cleveland<sup>71</sup> became emblematic of the shifting balance in domestic relations prompted by a new acceptance of functioning families. In Moore, the Supreme Court granted legal recognition to a functioning family of grandparents and children denied family status by local zoning rules that reserved the area for single families. Ironically, though suggestively, the Court vindicated functioning families in a case that arose right next-door to site of the suit in which it legitimated zoning, Euclid v. Ambler Realty Co.72 Now the Court asserted: "Ours is by no means a tradition limited to . . . the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."73 That had been true too earlier, but the reality of family diversity had been ignored in an attempt to implement the previous public narrative by demanding that single families be the proscribed form of household. Now the new story-line of family law forced a reconsideration of such Decisions like *Moore* challenged restrictive conceptions of the family iudgments. promulgated in the previous era, and thus helped tilt the discussion of family law away from state regulation by valorizing individual choice and family diversity.<sup>74</sup>

## A. Marriage

Changes in marriage law are apt illustrations of the liberationist tilt in domestic relations discourse that upset the marriage law balance to create a new era in American family law. As Marjorie Maguire Schultz argued in 1982, the law during recent decades "has evolved far toward recognizing the need for private choice and the untenableness of uniform public policy as a strategy for governing the conduct and obligations of intimacy." Though many of the restrictions imposed earlier in the century had become accepted as commonplace, such as licenses and blood tests, others continued to provoke controversy over the legitimate role of the state in regulating marriage.

<sup>70.</sup> MINTZ & KELLOGG, supra note 31, at 228.

<sup>71. 431</sup> U.S. 494 (1977).

<sup>72. 272</sup> U.S. 365, 388 (1926).

<sup>73.</sup> Moore, 431 U.S. at 504.

<sup>74.</sup> See generally EVA R. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY: IDEOLOGY AND ISSUES ch. 7 (1977).

<sup>75.</sup> Marjorie M. Shultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 CAL. L. REV. 207, 291 (1982).

The most contentious initial issue of the era was the continued ban on interracial marriages. Like other racist relics of "Jim Crow" America, it became a target of the egalitarian civil rights movements. Several states repealed the ban in the 1940s and 1950s, and then in 1967 the Supreme Court declared the restriction unconstitutional. Loving v. Virginia<sup>76</sup> gave marital freedom constitutional sanction. Calling matrimony one of the "basic civil rights of man," the justices tilted the law's balance against regulation by holding that unwarranted nuptial restrictions violated the principle of equality in the Fourteenth Amendment and thus deprived citizens of liberty without due process of law.<sup>77</sup> And they were quite willing to offer an expansive definition of such unwarranted curbs.<sup>78</sup> Justice William O. Douglas argued that "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations . . . . [T]he freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State." Folk devils had become rhetorical exemplars of rights holders.

Loving had significance far beyond the issue of racial restrictions on nuptial freedom. It occupied a similar substantive and symbolic place in this era that Maynard v. Hill<sup>80</sup> had filled in the previous one. Loving voiced the new tilt toward contractual freedom that came to dominate all debates about marriage law. In 1983, Weyrauch and Katz captured the tenor of this shift when they argued that:

The importance of *Loving* should not, however, be seen in its ability to support a winning argument in court. In our view, its function is to signal potential changes in the law of marriage. These changes favor the increased autonomy of the parties and the decline of State involvement in marriage.<sup>81</sup>

Yet they also suggested that *Maynard* and *Loving* formed alternative dialects of nuptial law that existed for those who would dispute the role of the state in governance of marital relations:

In other words, the power of the State to regulate marriage, following *Maynard*, is likely to be strictly construed and not necessarily extended to cover nonmarital cohabitation. If formal and informal marriage are viewed as being functionally related, the permissive message of *Loving* seems to prevail over restrictive State regulation insofar as informal marriage is concerned.<sup>82</sup>

The increased recognition for functional marriages made possible by the new balance in the law was evident in cases like *Zablocki v. Redhail.*<sup>83</sup> In that decision, the Supreme

<sup>76. 388</sup> U.S. 1 (1966).

<sup>77.</sup> Id. at 12.

<sup>78.</sup> For a useful discussion of this point, see Stephen J. Morse, Family Law in Transition: From Traditional Families to Individual Liberty, in CHANGING IMAGES OF THE FAMILY 332-33 (Virginia Tufte & Barbara Myerhoff eds., 1979).

<sup>79.</sup> Loving, 388 U.S. at 12 (Douglas, J., concurring).

<sup>80. 125</sup> U.S. 190 (1888). See supra notes 15-17 and accompanying text.

<sup>81.</sup> WEYRAUCH & KATZ, supra note 17, at 233.

<sup>82.</sup> WEYRAUCH & KATZ, supra note 17, at 233-34.

<sup>83. 434</sup> U.S. 374 (1978).

Court struck down a Wisconsin law that denied marital rights to those with existing child support debts.84 The statute was a vivid example of the dual system of family law's continued hold on nuptial regulation as well as its tendency to tilt the regulatory balance toward marital restrictions. Conversely, its rejection by the Court exemplified the rippling consequences of labeling marriage a fundamental right. Indeed, Justice John Paul Stevens voiced the contemporary opposition to class distinctions in a concurring opinion. He dismissed the Wisconsin statute because it sanctioned the policy declaration that "the rich may marry and the poor may not. This type of statutory discrimination is, I believe, totally unprecedented, as well as inconsistent with our tradition of administering justice equally to the rich and to the poor."85 Though precisely such a dual system had long been sanctioned by family law, Stevens' denunciation aptly captured the new marital balance. As he concluded, "[e]ven assuming that the right to marry may sometimes be denied on economic grounds, this clumsy and deliberate legislative discrimination between the rich and the poor is irrational in so many ways that it cannot withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment."86 In a 1979 article on family law in transition, Stephen J. Morse expressed the priorities sanctioned by the marriage law discourse created by decisions like Zablocki: "Although 'mismatches' and their consequences interfere with the goals of traditional family life and are costly to society, these are costs that should be borne because freedom to marry the person of one's choice is too precious to abandon."87 Such sentiments, Milton Regan concluded fifteen years later, meant that although "the Court has been careful to proclaim the validity of reasonable regulations that do not significantly interfere with the marriage decision, the clear message is that individual choice regarding marriage is an exercise of personal autonomy to which the state should defer in most cases."88

The new tilt in marriage law had a corrosive effect on all nuptial restrictions as it reframed debate to give the highest priority to marital choice. The marital hurdles set up to save the family by the previous generation of domestic relations law reformers began to be knocked over. Both judges and legislators curtailed their roles as nuptial regulators. As Weyrauch and Katz noted:

The capacity to marry has been substantially broadened, even at the risk of greater expenditure of tax funds. Age requirements have been lowered. Mental competence to marry is assumed, not only in the young, but also in the mentally retarded, infirm, and senile. For some relationships and some purposes, incest taboos appear less serious than a generation ago because procreation is no longer always a primary concern of marriage.<sup>89</sup>

Other restrictions on marriage also felt the consequences of the new legal balance as even bans on prisoner marriages fell off the scales. And, resurrecting the dominant judicial

<sup>84.</sup> Id. at 377.

<sup>85.</sup> Id. at 404 (footnotes omitted).

<sup>86.</sup> Id. at 406 (footnotes omitted).

<sup>87.</sup> Morse, *supra* note 78, at 333.

<sup>88.</sup> MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 37 (1993).

<sup>89.</sup> WEYRAUCH & KATZ, supra note 17, at 352.

policy of the antebellum era, "[r]equirements for marriage that appear on the books are held to be directory only, addressed to state authorities. Violations that would have voided marriages in the past are no longer seen as affecting the essence of the relationship." Clearly marriage law discourse had a new dominant dialect. It legitimated the removal of what had come to be considered unreasonable burdens on the decision of individuals to marry. The major consequence of this liberationist tilt, Regan maintains, is that it helped create the era's "greater receptivity to private ordering of family matters."

The convergence of the judicial designation of marriage as a basic civil right and the legislative retreat from nuptial regulation found a clear and telling expression in the uniform statute movement. Since its creation late in the nineteenth century, the drive for voluntary legal uniformity through state acceptance of model statutes had been a telling indicator of baseline sentiments in the law. This era was no exception. The Uniform Marriage and Divorce Act of 1970<sup>92</sup> eliminated many of the nuptial curbs created in the previous era such as restrictions on the remarriage rights of the guilty party in a divorce. In their place, it set only minimal formalities for marriage ceremonies, and even questioned the utility and desirability of premarital medical examinations. The model statute also urged that marriages entered into in violation of its requirements be considered valid unless formally declared void. The import of the act was to suggest that the state role in matrimony be one primarily of licensing and regulation, not restriction and monitoring as it had been promulgated in the previous period's uniform marriage laws.<sup>93</sup>

The shifting emphasis of marriage law occurred in an era of marital experimentation reminiscent of antebellum America. As Mintz discovered in 1991, "the number of unmarried couples cohabiting climbed steeply. Since 1960, the number of unmarried couples living together has quadrupled." This proliferation offered clear evidence of the continuing popular conviction that legitimate unions could and should exist outside the established bounds of marriage law. And as in that previous period, a tendency to confer legal status on a variety of marital arrangements followed from debates that talked of marriage as more of a private than a public issue. Toleration increased accordingly and thus fundamentally rephrased the debate over functional marriages.

As a result of the interaction between popular behavior and liberationist legal developments, informal unions once again tested both the legitimacy and the extent of marital regulation. Indeed, in yet another development that echoed without replicating the era in which common law marriage had been created, courts began to increase the responsibilities of partners in informal yet functioning marriage-like unions. Taking the lead in this as in so many issues of the era, judges did so by enforcing oral contracts and implied contracts between couples cohabiting outside of marriage. As Regan noted:

Receptivity to private ordering of the terms of family life is underscored by greater willingness of courts to enforce marital contracts. Courts traditionally were reluctant to enforce most antenuptial agreements between spouses for fear

<sup>90.</sup> WEYRAUCH & KATZ, supra note 17, at 352.

<sup>91.</sup> REGAN, supra note 88, at 36.

<sup>92. 9</sup>A U.L.A. 147 (1993).

<sup>93.</sup> For a discussion of the Act, see JACOB, supra note 62, at ch. 5.

<sup>94.</sup> Mintz, supra note 68, at 185.

that they might alter the 'essential incidents' of marriage or that provision for property division or support upon divorce might encourage marital dissolution. With the decline of consensus about the terms of marriage, and with the prevalence of divorce, most states have adopted the view that it is unreasonable to regard marital contracts as contrary to public policy.<sup>95</sup>

Palimony cases like Marvin v. Marvin<sup>96</sup> illustrate the shifting balance in the law that produced the inclination to grant legal status to voluntary assumed marital forms despite the legal tradition of not enforcing contracts founded upon illegal or immoral consideration. In supporting Michelle Marvin's claim for economic benefits from her relationship, the California Supreme Court decided that when couples living together out-of-wedlock break up, the parties may be entitled to a legally enforceable dissolution of their property depending on their agreements and expectations concerning their relationship and property. Conversely, they rejected Lee Marvin's attempt to invalidate the relationship as an immoral exchange of support for sex: "The fact that a man and a woman live together without marriage... does not in itself invalidate agreements between them relating to their earnings, property, or expenses." Nor did the court accept arguments that upholding Michelle's claim would undermine matrimony itself. Though such arguments had been persuasive in the previous era, now the judges voiced the conviction that:

[T]he prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.<sup>99</sup>

The decision, as Morse suggests, epitomized the tendencies of the era's marriage law to both sanction individual choice and hold individuals accountable for their choices:

In sum, couples living together could obtain all the economic benefits and consequences (in California) of marriage simply by agreeing to do so, and courts would enforce the contract. This decision gave couples living together more freedom to arrange their economic affairs than is usually given to married couples.

Marvin was a revolutionary case because it treated some couples living together much as if they were married, a result previously achieved only by

<sup>95.</sup> REGAN, supra note 88, at 37.

<sup>96. 557</sup> P.2d 106 (Cal. 1976).

<sup>97.</sup> Id. at 122-23.

<sup>98.</sup> Id. at 113.

<sup>99.</sup> Id. at 122.

common law marriage, a disfavored institution that had been abolished in California.<sup>100</sup>

Through decisions like *Marvin v. Marvin*,<sup>101</sup> the contractualism that had previously undergirded common law marriage had a second legal life as did its functional definition of marriage. And it was broadcast throughout the nation by another model statute, the Uniform Premarital Agreement Act<sup>102</sup> drafted in 1983. The Act advised that premarital contracts should be considered unenforceable only if one of the parties entered the relationship involuntarily, if the contract was unconscionable, or if there had been inadequate disclosure.<sup>103</sup> Debate over the legalization of cohabitation demonstrated not only the era's domestic relations tilt but also the continued existence of the law's balancing act. As Lenore Weitzman commented, "opponents of intimate contracts regard marriage primarily as a public institution, while proponents view it as a private relationship." During this era, unlike the previous one, proponents had the rhetorical edge.

Finally, as it always had in the past, divorce once again had helped define the discourse of marriage law. Changes in divorce law sprang from the same tilt toward individual choice and private ordering that dominated marriage law. And in divorce too, the regulatory deterrents created earlier in the century became the prime targets for change. Restrictions on divorce and even more tellingly, the very notion of fault as the prime issue in dissolving a marriage lost their authority as the legal balance tilted away from public regulation. Finally, as in the case of marriage law, changes in divorce law proceeded in a reciprocal way with broader social changes. Prime among these were both the escalating rate of divorce and the declining stigmatization of the divorced. By 1991, the number of divorces was "twice as high as in 1966 and three times higher than in 1950." 105

The most dramatic and telling change began in 1970 when California adopted no-fault divorce. The legislature shifted the emphasis from public regulation to individual choice by eliminating the need for couples to prove the commission of a martial crime in order to dissolve a marriage. The innovation spread rapidly through the nation. Between 1970 and 1975 all but five states adopted some form of no-fault divorce; and by the early 1990s South Dakota remained the only hold-out. The shift allowed couples throughout the republic to dissolve their union by claiming incompatibility, irretrievable breakdown, or similar justifications. Indeed, not only were specific grounds for divorce eliminated but a marriage could even be terminated by one spouse without the consent of the other. The substitution of "dissolution" for "divorce" revealed the tilt away from fault and guilt. After surveying the consequences of the rapid triumph of no-fault, Regan

<sup>100.</sup> Morse, supra note 78, at 354.

<sup>101. 557</sup> P.2d 106 (Cal. 1976).

<sup>102. 9</sup>B U.L.A. 369 (1983).

<sup>103.</sup> Id. at 376.

<sup>104.</sup> LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW 231 (1980).

<sup>105.</sup> Mintz, supra note 68, at 184.

<sup>106.</sup> Mintz, *supra* note 68, at 191. *See also* JACOB, *supra* note 62, at ch. 4; RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 619-34 (1988).

explained its larger implications for the on-going debate about the proper balance in family law:

The conceptualization of marriage as a private matter is underscored by the trend to disregard or define very narrowly marital fault in determinations concerning property division, alimony, and custody. Such a posture reflects the view that there is little if any social consensus about standards that should govern marital behavior, and that states should refrain from passing judgment on the substance of marital interaction unless some direct harm can be demonstrated. The connection between this agnosticism about marital behavior and no-fault divorce is apparent: if the state feels less able to assess the propriety of behavior in an existing marriage, then it is in a poor position to proclaim what behavior justifies ending the marriage. <sup>107</sup>

Equally telling, divorce reform included its own assault on family law's dual system. Boddie v. Connecticut<sup>108</sup> helped define marriage as a constitutionally protected right by striking down a mandatory filing fee for divorce. The Supreme Court ruled that the fee violated the due process rights of impoverished but estranged couples.<sup>109</sup> It did so by labeling divorce the "adjustment of a fundamental human relationship"<sup>110</sup> and the method by which "two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage."<sup>111</sup>

As a result of the tilt toward individual choice in debates over marriage and divorce, those who argued for significant public controls on matrimony became less and less persuasive. Instead of broadcasting a uniform image of fit marital partners or even of marriage itself, family law framed the issue as fundamentally an individual decision likely, and legitimately, to produce a wide variety of answers.

## B. Custody

Custody law also underwent a fundamental rephrasing as a result of the shifts in domestic relations discourse. Amidst broad changes in gender roles and beliefs, parenthood once again became a hotly contested issue in domestic relations. Converging trends sparked debate. Particularly visible was the rapid increase of married women in the workforce. Herbert Jacob has chronicled the magnitude of the change:

During the first half of the century, most married women stayed at home; in 1900, only 5.6% of those married worked outside the home; by 1940 that had risen only to 13.8%. Thereafter, however, labor market participation of married women exploded with a rise of ten percentage points every decade. By 1985,

<sup>107.</sup> REGAN, supra note 88, at 39.

<sup>108. 401</sup> U.S. 371 (1971).

<sup>109.</sup> Id. at 374.

<sup>110.</sup> Id. at 383.

<sup>111.</sup> Id. at 376.

54.3% of all married women were in the labor force. Indeed, by 1985 a majority of married mothers with infants under three years old were working.<sup>112</sup>

Such developments provided women with alternative forms of economic security to marriage and fed growing debates about gender roles. And so did a newly reconstituted feminist movement. Most importantly, feminist demands for gender equity and greater male family responsibility challenged the maternalist legacy of the previous era and its inscription in all branches of family law. At the same time, the place of children in law also sparked controversy. Amidst ever escalating divorce rates, approximately one-third of the children born in the era would experience a custody determination as well as the proliferation of family forms. Indeed, the trend was so pronounced, Mary Ann Mason discovered, that a "child born in 1990 had about a fifty percent chance of falling under the jurisdiction of a court in a case involving where and with whom the child would live." 113

Simultaneously, new ideas about children, especially a growing conviction that children had their own liberty interests separate from parents, also emerged to challenge the inherited balance in custody law, as did an equally pronounced tendency for the state to intervene and remove children from families. Finally, ideological and technological change created a bewildering combination of possible parents: genetic parents, social parents, and a gestational parent. Writing in 1979, Morse surveyed these developments and concluded that "the liberty and autonomy interests of women and children have been recognized and furthered and the costs of family life have been exposed. Together these movements have fostered the dominant modern shift in family law—increasing autonomy for family members in relation to one another."

In custody law, maternalism as the singular definition of parenting became the initial focal point of growing and intense debate about the proper balance between public and individual interests in child rearing. As a result, the presumed superior ability of mothers to raise children that undergirded custody law faced growing challenges as did the concomitant assumption of a uniform definition of a fit parent that maternalism had provided. Instead, diversity gained new legitimacy and functioning families new legal support. All of this made custody one of the most dramatic and contentious legal issues of the era.

By 1970, maternal preference had became the prime casualty of the shifting balance in custody law. It had ceased to provide the dominant public narrative of custody law. State legislatures and the courts rephrased custody law by abandoning maternal preference. For example, between 1960 and 1990 nearly all states either eliminated the tender years doctrine or reduced its significance in custody determinations. Similarly, the Uniform Marriage and Divorce Act attacked one of the major props of maternal

<sup>112.</sup> JACOB, supra note 62, at 17-18.

<sup>113.</sup> MASON, supra note 54, at 121.

<sup>114.</sup> Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1758 (1993).

<sup>115.</sup> Morse, supra note 78, at 321.

<sup>116.</sup> For a discussion of these trends, see Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992).

<sup>117.</sup> MASON, supra note 54, at 123.

preference, the use of marital fault in custody awards. It urged states to adopt codes that distinguished between spousal conduct and parenting rights by suggesting the admonition that the "court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." And the Uniform Parentage Act<sup>119</sup> recommended the equal balancing of the claims of fathers and mothers.

Judges and legislators sought a replacement for maternal preference through a reinvocation of the now long-lived, ever mutable best interests of the child doctrine. The doctrine's indeterminate meaning framed a search for a new balance in custody law that opened the way for greater recognition of functioning families in ways that paralleled the debate over the recognition of functioning marriages. At the same time, eliminating maternal preference reopened the question of what constituted a legally fit parent. In doing so, it also revealed that parenthood had no transcendent meaning, but was always socially constructed during particular moments in time. The resulting debate, which carries into our time, had numerous consequences.

One of its most immediate consequences was to give fathers new legal standing by legitimating rhetorical arguments of equal parenting ability regardless of gender. For example, in 1973 a New York appellate court explicitly rejected the gender assumptions of the previous era when it declared: "The simple fact of being a mother does not, by itself, indicate a capacity or willingness to render a quality of care different from that which the father can provide."120 Instead, the judges offered a new set of assumptions by asserting that scientific studies showed that "the essential experience for the child is that of mothering—the warmth, consistency and continuity of the relationship rather than the sex of the individual who is performing the mothering function."<sup>121</sup> Conversely, women faced new tests of their parenting skills in rephrased narrative battles that gave credence to judicial biases about working women and female sexuality. An Illinois judge asserted, for instance, that the tender years' doctrine has no application if the mother is working and not in the home full time. 122 Similarly, a Missouri appellate court contended that "if the mother goes and returns as wage earner like the father, she has no more part in the responsibility [of child care] than he."123 And judges criticized the ability of working women to care for their children. The result was to throw the gender balance in custody into doubt and to rearrange the dynamics of divorce. 124

Calls for a new definition of a fit parent rearranged the balance of power in disputed custody cases. Even though mothers still tended to request custody most of the time and succeeded in obtaining custody in upwards of ninety percent of all cases, their success rate declined as more and more fathers demanded custody. Although most fathers did not request custody, those that did had greater and greater success. Studies reported success

<sup>118.</sup> Unif. Marriage and Divorce Act, § 402, 9A U.L.A. 147, 561 (1987).

<sup>119. 9</sup>B U.L.A. 287 (1994).

<sup>120.</sup> State ex rel. Watts v. Watts, 350 N.Y.S. 2d. 285, 289 (1973).

<sup>121.</sup> Id. at 290.

<sup>122.</sup> In re Stevens, 538 N.E.2d 1279, 1281-82 (Ill. App. 1989).

<sup>123.</sup> GRISWOLD, supra note 10, at 264.

<sup>124.</sup> See, e.g., Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985).

rates of fathers that ranged from forty percent to sixty percent. The sources of those victories, Mason argues, lay in the era's shifting gender balance of power:

[W]hile only a small percentage of custody disputes reached trial and were decided by a judge rather than the parties, the fact that judges were more willing to look favorably upon fathers' appeals for custody influenced the private bargaining process. Some fathers who may have had no real desire for custody, threatened mothers with the possible loss of custody under the new rules in order to secure advantages in property division, spousal support, and child support. On the other hand, fathers who did want more time with the children could use the law to bargain for greater access.<sup>125</sup>

In this way, the rearranged balance of gender power in custody law sanctioned parental diversity while also securing a primary goal of the nascent fathers' rights movement: to "overcome the decades-old assumption that mothers were the more capable parent and to insist that fathers be assured continued involvement in the lives of their children." <sup>126</sup>

The most significant consequence of this new commitment to gender equity among divorcing parents was the creation and rapid diffusion of joint-custody. Once again California became the era's major family law innovator when it adopted joint custody in 1979. However, unlike the state's other major domestic relations innovation, no-fault divorce,

[Joint-custody] was a change that did not mirror existing practice. It was an invention that went counter to prevailing assumptions about proper child custody decisions. Unlike no-fault, it was not conceived in response to technical problems in the legal system and it was not a product of legal experts. Rather, it reflected the changing life-styles of middle-class American families and a nascent demand by fathers for greater consideration.<sup>127</sup>

On the contrary, legislators explicitly rejected the once dominant view, advanced most influentially by Goldstein, Freud, and Solnit in *Beyond the Best Interests of the Child*, that children involved in parental separations needed the stability that only a permanently designated single custodial parent could provide.<sup>128</sup> Instead, following arguments like the anthropological analysis of Carol Stack that children could and had thrived within multiple family forms, lawmakers endorsed the idea of divorced parents sharing the custody of their offspring.<sup>129</sup> Joint custody also allowed legislators and judges to avoid the newly difficult problem of choosing between mothers and fathers, as New York judge Felicia K. Shea admitted: "Joint custody is an appealing concept. It permits the Court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes." The new custody

<sup>125.</sup> MASON, supra note 54, at 129.

<sup>126.</sup> GRISWOLD, supra note 10, at 261.

<sup>127.</sup> JACOB, supra note 62, at 133-34.

<sup>128.</sup> JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973).

<sup>129.</sup> Carol B. Stack, Who Owns the Child? Divorce and Child Custody Decisions in Middle-Class Families, 23 Soc. PROBS. 505-15 (1976). See also JACOB, supra note 62, at 133-42.

<sup>130.</sup> Dodd v. Dodd, 403 N.Y.S.2d 401, 401 (N.Y. Sup. Ct. 1978).

creation also rested on the assumption that divorced parents could and would share equally the legal rights and responsibilities of parenthood. By 1990, thirty-six states had followed California's lead and authorized some form of joint custody as well as declaring a preference for its use.<sup>131</sup> Joint custody replaced maternal preference as the seemingly natural and logical operating assumption as well as the rhetorical ideal of custody law.<sup>132</sup>

The debate over the proper balance in custody law between parental rights and state interests extended beyond disputes involving divorcing mothers and fathers. The demise of maternal preference as the public narrative custody law encouraged challenges to all established conceptions of parental fitness and rights. The resulting willingness to consider the legitimacy of functioning families created without benefit of marriage renewed the longstanding debate over the rights and duties of unwed parents. And, as Karen Czapanskiy has observed, in this period, like those of the past, "[h]ow the law regards men and women as parents is displayed with clarity in the legal relationship of unwed parents and their children." <sup>1133</sup>

Unwed fathers were the main beneficiaries of the new tilt in custody law. Increasing regard for unwed fathers' custody rights expressed the new status of fatherhood and its underlying assumption that children need a paternal presence in their lives. It also, as Mason determined, "reflected the shifting balance toward fathers and the emphasis on biological parenthood that characterized other aspects of custody law reform. As in other critical family law debates of the era, the Supreme Court helped frame the debate. In the 1972 case of Stanley v. Illinois, 135 unwed fathers received custody rights if proven fit parents. Joan Stanley and Peter Stanley had formed a functioning family. They lived together with their three children intermittently for eighteen years. Peter challenged the constitutionality of an Illinois statute mandating that children of unwed fathers became wards of the court upon the death of the mother. He argued that the policy violated his equal protection rights by treating him differently than married fathers, who were presumed to be fit custodians under Illinois law whether they were divorced, separated, or widowed. The Supreme Court supported him and ordered that fitness hearings to determine custody must be held for unwed fathers as for all natural parents in this circumstance. 136 Justice Byron White declared: "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."137

<sup>131.</sup> MASON, supra note 54, at 131.

<sup>132.</sup> Joint custody's only significant competitor was another creation of the era, the primary caretaker preference. The gender neutral rule awarded custody to a parent based on a quantitative assessment of the time spent caring for a child. But it was adopted only in West Virginia and Minnesota. For a discussion of the concept, see David Chambers, Rethinking the Substantive Rule for Custody Disputes in Divorce, 83 MICH. L. REV. 477 (1984).

<sup>133.</sup> Karen Czapanskiy, Volunteers and Draftees: The Struggle for Parental Equality, 38 UCLA L. REV. 1415, 1417 (1991).

<sup>134.</sup> MASON, supra note 54, at 145.

<sup>135. 405</sup> U.S. 645 (1972).

<sup>136.</sup> Id. at 658.

<sup>137.</sup> *Id.* at 651.

However, debate about the proper balance of rights for unwed fathers also focused on the reality that most of these men did not live with their children and had little or no contact with them. The issue arose with particular urgency in challenges to adoptions by unwed fathers. Once more the Supreme Court supplied a critical answer. It did so when a father who had never lived with his two year old daughter or her mother protested the girl's adoption. He argued that failure to notify him of the proceedings so that he could protest the termination of his parental rights denied him equal protection. The Court disagreed. In explaining why, Justice John Paul Stevens offered a fulsome conception of the ideal of functioning parenting being embedded in custody law:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he many enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.<sup>138</sup>

Applying such a standard, the courts created a new balance that tilted the rights of unwed fathers toward those of married men. In doing so, Mary Ann Glendon argues, such a rephrasing of the law became one more instance of a larger development of the era: "[T]he traditionally central position of legal marriage in family law has been extensively eroded everywhere." As a result, unwed fathers who demonstrated a willingness to act as parents could secure greater rights to visitation, consent to adoption, and inheritance along with their longstanding duty of support. The shift in legal rights represented a significant new balance in the law and increase in the parental authority of unwed fathers. However, full equalization of all biological fathers' custody rights did not occur. Despite the new legal balance, a boundary line continued to separate the rights of married and unmarried fathers. 141

Equally important, gender distinctions remained critical to debates over the rights of unwed parents as they did to all family law discourse. Indeed, the demise of maternal preference and significant increases in the numbers of single mothers during the era made single mothers a new concern. And as a result of the new balance in the law, unwed mothers lost a portion of their custody rights to unwed fathers who demonstrated some parental concern. Nevertheless, as Czapanskiy makes clear, in this, as in other areas of custody law, the rhetoric of gender equity often camouflaged the reality that mothers remained the primary parent and retained major parenting responsibilities:

Unlike the nineteenth century award of custody to unwed mothers, the late twentieth century award of custody rights to unwed fathers has not been

<sup>138.</sup> Lehr v. Robertson, 463 U.S. 248, 262 (1983).

<sup>139.</sup> MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 284 (1989).

<sup>140.</sup> For general discussions of these trends, *see* GRISWOLD, *supra* note 10, at 239-42; MASON, *supra* note 54, at 145-48.

<sup>141.</sup> See, e.g., Michael H. v. Gerald D., 491 U.S. 110 (1989).

accompanied by a wholesale change in the duties of fathers to provide the child with a name or with inheritance rights. While some changes have occurred, they are only piecemeal. Most often, the changes have been efforts to equalize the status of illegitimate and legitimate children, not to equalize the responsibilities borne by mothers and fathers of illegitimates.<sup>142</sup>

Instead of actual custody, questions of paternal support dominated debates about the relationship between unwed parents.

The renewed debate over the proper balance in custody law also grew to include direct clashes between parents and the state. Both the demise of maternal preference and the growth of the American variant of the welfare state undermined the anti-institutionalism and aversion to removing children from their homes that had characterized the previous period. According to Mason:

The delicate balance between the state as child protector and the privacy rights of parents to the custody and control of their children definitely tilted toward the authority of the state. The state intervened in families at a rate unknown in history, providing a wide variety of support and sometimes removing the children when the support could not, in the state's opinion, cure the families' problems. The publicly supported child protection agencies still enjoyed some state and even local autonomy, but the trend favored ever more federal government control. Federal control was exacted by U.S. Supreme Court decisions governing procedure in the removal of children from their homes and termination of parental rights, and by federal statutes exacting uniform requirements in exchange for federal funds.<sup>143</sup>

Neglect and abuse became the principal grounds for removal. The upsurge led to redefinitions of the relationship between parental rights and child need.

The vagaries of that relationship in an age that constantly questioned uniform ideas of parental fitness became evident in yet another seminal Supreme Court custody discussion. After several attempts to protect their rights, John and Annie Santosky finally reached the high court. A New York social agency had removed three of their children after charging the couple with neglect. The Santoskys then resisted a petition to terminate their parental rights. After losing in the New York courts, they found relief in Washington. In Santosky v. Kramer, 144 the Court ruled that the rights of natural parents could only be terminated upon clear and convincing evidence of parental neglect. 145 Justice Harry A. Blackmun insisted that the fundamental liberty interest of natural parents in the care, custody, and management of their child meant that the procedures affecting termination of parental rights must be fair and that proof must be clear and convincing:

Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need

<sup>142.</sup> Czapanskiy, supra note 133, at 1425.

<sup>143.</sup> MASON, supra note 54, at 150.

<sup>144. 455</sup> U.S. 745 (1982).

<sup>145.</sup> Id. at 747-48.

for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.<sup>146</sup>

Such rulings did not guarantee parental custody rights so much as create the framework for balancing the clashing claims of families and welfare agencies. And the best interests of the child doctrine framed the subsequent debates by posing the issue as one of balancing tests between individual and public interests and of the legitimacy of various family forms and conduct.

Even the age-old commitment of custody law to biological ties faced new challenges. The most dramatic came from incredible developments in reproductive technology that enabled people who could not otherwise have babies to have them. The new artificial birth procedures included *in vitro* fertilization, artificial insemination, ovum donation, embryo freezing for future use, embryo transfer, and surrogate mothering. And the results were equally startling. Between 1981 and 1987, about eight hundred test-tube babies were born in the United States; and by 1987 about six hundred children had been born to surrogate mothers. Significantly, five of those surrogate mothers had refused to surrender custody.<sup>147</sup>

In 1986, a bitter New Jersey custody battle broke out when one of those surrogate mothers, Mary Beth Whitehead, refused to deliver her infant daughter to its biological father, William Stern. Under their agreement, Whitehead was artificially impregnated by Stern, and she carried their child to term. The legality and enforceability of surrogate motherhood contracts became the primary issue in the case as did the right of the surrogate mother to change her mind about relinquishing custody. The dispute also provoked a larger debate about whether such arrangements inevitably involved class exploitation since surrogate mothers tended to be poorer and less educated than the couples hiring them. The New Jersey Supreme Court in *In the Matter of Baby M* declared the contract void and likened it to baby selling:

The evils inherent in baby-bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents. The natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime. In fact, the monetary incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary.<sup>148</sup>

After this invocation of family sentiments, the judges relied on the balancing test of the best interests of the child doctrine to determine Baby M's custody. Giving each parent's claim equal weight, they awarded the child to Stern because his home seemed more suitable for the child.<sup>149</sup> In this and related cases generated by the new technologies, the new commitment to diverse forms of parenthood reinforced the inherent appeal of the balancing test embedded in the best interests of the child's doctrine. Louisiana even

<sup>146.</sup> Id. at 753-54.

<sup>147.</sup> Mintz, supra note 68, at 206-07.

<sup>148. 537</sup> A.2d 1227, 1241 (N.J. 1988) (citation omitted).

<sup>149.</sup> Id. at 1256-64.

extended the rule to new forms of reproduction by insisting that "disputes between parties should be resolved in the 'best interests of the embryo' and that interest would be 'adoptive implantation.'"<sup>150</sup>

Finally, despite the broad debate over parenting carried on in the era, the proliferation of family forms, and even the emergence of what came to be called social parenting, biological ties continued to outweigh the custody claims of other custodians. Foster parents in particular failed to secure legal support for the families they created even though foster care had become the preferred form of placing children removed from their homes. Instead, foster parents were treated more like a vendor with a contract than a parent in a functioning family. The Supreme Court sanctioned that secondary status in *Smith v. Organization of Foster Families*, <sup>151</sup> a 1977 decision that denied foster families the same status as natural families.

The class action suit claimed for foster parents a constitutionally protected liberty interest in the children they reared and thus a right to a full hearing to determine their fitness before the children could be removed from their care. In rejecting the claim, the Court identified the key issues to be weighed in determining custody. Justice William Brennan admitted that the "usual understanding of 'family' implies biological relationships," but he acknowledged that "biological relationships are not exclusive determination of the existence of a family." Accepting the existence of functioning families, he even lauded them:

[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.<sup>154</sup>

Consequently, Brennan recognized that the Court could not "dismiss the foster family as a mere collection of unrelated individuals." Nevertheless, after voicing a commitment to protect the rights of natural parents who had not fully relinquished their children, he felt compelled to underscore the distinctions between foster families and natural families:

It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized

<sup>150.</sup> MASON, supra note 54, at 144.

<sup>151. 431</sup> U.S. 816 (1977).

<sup>152.</sup> Id. at 847.

<sup>153.</sup> Id. at 843.

<sup>154.</sup> Id. at 844 (citation omitted).

<sup>155.</sup> Id. at 844-45.

liberty interest that derives from blood relationship, state-law sanction, and basic human right. 156

In this way, foster families exposed the limits of the era's debate over custody law. Writing two years later, Morse contended that *Smith* seems to fit the definition that nearly all Americans would accept:

The contours of the legal family seem to depend on marriage and biological or equivalent legal relationships. Relationships that do not have these bases are not considered families, even though they may be functionally equivalent to traditional families. Still, the recognition that "family-like associations" may have some family-like rights, especially where the best interests of children may be involved, reflects a concern for the rights of children and for the autonomy of adults who may obtain some family rights in nontraditional ways.<sup>157</sup>

And similar debates erupted over the custody of adopted children, most notably the recent tragic fight over "Baby Jessica." <sup>158</sup>

In short, in custody law, as in marriage, liberation rhetoric tilted family law toward greater recognition of individual rights and toleration of family diversity. Marriage and custody debates paralleled domestic relations discussions of everything from children's rights and spousal rape to abortion and inheritance rules.<sup>159</sup> The result was a new dominant dialogue for discussing the law.

But, of course, that dominant rhetoric did not tell the whole story. It never does. The debate over family law, especially during the last decade, has been filled with challenges expressed yet again in terms of reversing the law's balance. And the calls for change have come in almost every category of domestic relations. Equally important, the innovations of the recent era have been the targets of complaint. Mintz captured the tenor of the growing complaints and provided a list of the focal points of concern:

[T]he shift toward family laws emphasizing equality and individual rights has come at the expense of certain other values. Our current no-fault divorce system, for example, does a poor job of protecting the welfare of children, who are involved in about two-thirds of all divorces. Compared to the divorce laws in Western European countries, American divorce laws make it relatively easy for noncustodial divorced parents to shed financial responsibility to their exspouses and minor children. Child support payments are generally low (and are not adjusted for inflation), and spouses have great leeway in negotiating financial arrangements, including child support (in over 90 percent of all divorce cases, the parties themselves negotiate custody, child support, and division of marital property without court supervision). In addition, feminist legal scholars maintain that under present law, divorced women are deprived of the financial

<sup>156.</sup> *Id.* at 846. For a full analysis of the case, *see* ROBERT H. MNOOKIN ET AL., IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY Pt. III (1985).

<sup>157.</sup> Morse, *supra* note 78, at 325.

<sup>158.</sup> MASON, *supra* note 54, at 187-88. For a general discussion of these issues, *see* MASON, *supra* note 55, at 156-69.

<sup>159.</sup> For a recent analysis of these broad changes in family law, see REGAN, supra note 88.

support they need. Under no-fault laws many older women, who would have been entitled to lifelong alimony or substantial child support payments under the old fault statutes, find it extremely difficult to support their families. Courts, following the principle of equality, generally require ex-husbands to pay only half of what is needed to raise children, on the assumption that the wife will provide the remainder. Furthermore, the shift toward gender-blind custody standards has led courts to move away from standards that favored the mother—by stressing day-to-day caretaking responsibilities, such as feeding, bathing, dressing, and attending to the health-care needs of the child—and to attach more emphasis on standards that favor the father, such as an emphasis on the child's economic well-being. 160

As a result of such complaints and concerns, the family has become a battleground yet again. Demands for a return to maternal preference, the reinstitution of fault in divorce, the imposition of greater restrictions on young persons' marital rights, and the institution of custodial restrictions on single mothers have tried to tilt the law back toward family uniformity and public regulation. Once more a moral panic has set in and crystallized worries and anxieties about social change into Jeremiads of family crisis. As fear has replaced confidence, the debate has been framed in terms of altering the balance between individual rights and public regulation by refusing legal recognition to functioning families.

As in the past, the creation of the family law folk devils of our age are perhaps the most illustrative examples of the resulting family law debate. Same-sex marriage fills that unwelcomed role today. Such unions have long been banned either directly by statute or through judicial statutory interpretations. Gay and lesbian claims for the right to wed and the attendant actual and symbolic benefits of matrimony suggest once more how groups of people turn to the law for legal aid and legal recognition. However, as in the cases of other groups denied marriage rights in the past, champions of same-sex marriage threaten, in the apt words of contemporary literary criticism, to decenter the public narrative of family law by challenging accepted meanings of wife, husband, mother, father, family, and marriage. In explaining their support for same-sex marriage, for instance, Yvonne Yarbro-Bejarano and Eleanor Soto underscore its political implications:

[O]ne thing we wanted was to create and make public a perception of lasting commitment among lesbians. In this way, getting married is an important part of building lesbian community. [We] felt there was a very strong political aspect to what we were doing. We weren't imitating an oppressive and sexist heterosexual institution; we were demanding the same rights and privileges of heterosexual couples. Our goal is not to imitate it but to transform it in progressive ways.<sup>162</sup>

<sup>160.</sup> Mintz, supra note 68, at 194. See also MINTZ & KELLOGG, supra note 31, at epilogue.

<sup>161.</sup> SEXUAL ORIENTATION AND THE LAW 95-101 (Harvard Law Review ed., 1990).

<sup>162.</sup> Quoted in Mary C. Dunlap, The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties, 1 L. & SEXUALITY 64 (1991).

Conversely, the vehement opposition to such claims turned proponents of same-sex marriages into folk-devils. As had others in the past, they stood accused of undermining national morality by threatening the sanctity of matrimony. Don Feder, a columnist and leader of the Christian Coalition, declared: "I do not accept the fantastic notion that two men who met the evening before in a leather bar constitute a family with the same legitimacy as a man and woman whose union is sanctified by commitment and faith, raising their children in a time-honored fashion." The resulting battles between advocates and opponents of same-sex marriage testifies yet again to the contentiousness of debates over family law. 164

One aspect of this debate is a particularly revealing example of the power of family law's dominant discourse to structure conflict over its rules. In trying to find ways to legitimate their position, proponents and opponents of same-sex marriage have turned to the age-old policy practice of historical analogy to tilt the law's balance toward their goal. Not surprisingly, given marriage law discourse, polygamy and miscegenation have the primary argumentative analogies. For opponents of same-sex marriage like Bruce Fein, polygamy is the most appealing analogy. "Authorizing the marriage of homosexuals, like sanctioning polygamy," he argues, "would be unenlightened social policy. The law should reserve the celebration of marriage vows for monogamous male-female attachments to further the goal of psychologically, emotionally, and educationally balanced offspring." Though he urged that other forms of legal discrimination against gay men and lesbians be re-examined, he drew the line at marriage. In that case, again as with polygamy, Fein concluded that the interests of the majority should outweigh those of a minority. 166

Thomas Stoddard replied to such arguments with a different lesson from the past and a different analogy. Relying on *Loving*, he argued that the recognition of marriage as a fundamental right meant that prejudice could not be used to legitimately limit individual nuptial rights. "The decision whether or not to marry belongs properly to individuals," Stoddard contended, "not to the government. While marriage historically has required a male and a female partner, history alone cannot sanctify injustice." Like the ban against interracial marriage, he considers the bar to same-sex unions as an unconstitutional form of discrimination that violates the equal protection rights of gay men and lesbians and urged the law be tilted toward individual rights. And these analogies have also been used in the courtroom. The Minnesota Supreme Court, for example, rejected the comparison to *Loving*, and instead drew "a clear distinction between a marital restriction

<sup>163.</sup> Quoted in Richard L. Berke, From the Right, Some Words of Restraint, N.Y. TIMES, Sept. 17, 1994, § 1, at 9.

<sup>164.</sup> For a discussion of these issues, see Symposium, The Family in the 1990's: An Exploration of Lesbian and Gay Rights, 1 L. & SEXUALITY 1 (1991).

<sup>165.</sup> Bruce Fein, Gay Marriage: Should Homosexual Marriage Be Regognized Legally? No: Reserve Marriage for Heterosexuals, 76 A.B.A. J. 43 (Jan. 1990).

<sup>166.</sup> *Id*.

<sup>167.</sup> Thomas Stoddard, Gay Marriage: Should Homosexual Marriage Be Recognized Legally? Yes: Marriage Is a Fundamental Right, 76 A.B.A. J. 42 (Jan. 1990). See also Andrew Koppleman, The Miscegenation Analogy: Sodomy Law as Sex Discrimination, 98 YALE L. J. 145-61 (1988).

<sup>168.</sup> Stoddard, supra note 167, at 42.

based merely upon race and one based upon the fundamental difference in sex."<sup>169</sup> As the clashing analogies vividly demonstrate, the family remains a litmus test of the well-being of our society.

#### **CONCLUSION**

I want to conclude by acknowledging that I have dwelt on only two of the three key words in the symposium theme. I have compared then and now, but shied away from speculating about the future. In part the reluctance represents a disciplinary aversion to prediction. Nevertheless, my necessarily brief discussion of a century of family law does lead to two final points. They are predicated on the significance of the assertion that in 1994, as in 1894, contests over who can wed and who is considered a fit parent ignite fierce family law debates and those debates are expressed in terms of finding a proper balance between individual rights and state interests.

First, I think that clashes over same-sex marriage or headline making custody cases like the fight over Baby Jessica emphasize the continuing power of the law to frame legal debates about troubled families in certain ways. Looking backwards does not solve these problems nor lessen their urgency. What it does, I think, is highlight the profoundly contingent character of family law rules and practices. And it reminds us that we too are actors in time and our time constrains the way we view the world. In other words, our inherited way of talking about family law has real consequences.

Second, I think the way we talk about family law also illustrates the critical distinction between hegemony and ideology. By that I mean that contemporary family law disputes, like those of the past, demonstrate again and again the ordering power of the law. It forces family conflict to be expressed through particular rules and procedures that grant the law its legitimacy. However, that ordering role does not produce uniform beliefs. On the contrary, it encourages various ideological convictions. Views on individual family rights, state regulation, and family diversity became the critical issue in those ideological beliefs. The result, I think, is that family law produces repeated generational conflicts but not permanent solutions. Instead, back to playground imagery, the law's balance constantly shifts while the teeter-totter stays in place.

And so, in thinking about the family law that students at Indiana University School of Law in Indianapolis learned then, are learning now, and might learn in the future, I am struck by how similar and how different are their educations. Students who learned the law here in 1894 would be surprised at many of the specific issues that dominate debates about family law today, but they would have recognized how we frame them and talk about them. It is that message of continuity and change I want to add to this Symposium.

<sup>169.</sup> Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971). See also Nan D. Hunter, Marriage, Law, and Gender: A Feminist Inquiry, 1 L. & SEXUALITY 14-15 (1991).

<sup>170.</sup> For a compelling discussion of the difference between hegemony and ideology, *see* JEAN COMAROFF AND JOHN COMAROFF, OF REVELATION AND REVOLUTION: CHRISTIANITY, COLONIALISM, AND CONSCIOUSNESS IN SOUTH AFRICA ch. 1 (1991).

# THE WARREN COURT: YESTERDAY, TODAY, AND TOMORROW

### KERMIT L. HALL\*

### I. THE REVISIONISTS' ATTACK ON LIBERAL INSTRUMENTALISM

Woody Allen once observed that "relationships are like sharks: they either move forward or they die." Much the same can be said about scholars of the Supreme Court: they either revise received wisdom or they perish. There are no good insights, only new insights. The passage of time usually exacerbates this phenomenon, often to the point of making well intentioned prevaricators out of even the most skilled revisionist scholars. As the past recedes, we too often begin to believe that what was real was not, only to discover, upon reflection at anniversaries such as this one marking the quarter century since Earl Warren's retirement, that it really was.

This practice of creative interpretation has become pronounced in the scholarship treating the Warren Court. President Richard Nixon understood the Court and the political stakes created by its work better than many scholars do today. Nixon exclaimed repeatedly in the course of the 1968 campaign that the Court's decisions had "gone too far in weakening the peace forces as against the criminal forces of this country." Nixon promised to select only strict constructionists, Justices who would stop the coddling of criminals, restore the proper place of the states in the federal system, and promote respect for family values. Yet today we seem to have forgotten Nixon's simple lesson. We have so disentangled the Warren Court and its jurisprudence from their historical contexts that we fail to appreciate that Court's singular place in the American constitutional experience.

The traditional, consensus approach to the Warren Court, like Nixon, took the Justices' liberalism seriously. Scholars such as Martin Shapiro, Robert Dahl, Anthony Lewis, Archibald Cox, Bernard Schwartz, and G. Edward White, while addressing the Warren Court in somewhat different ways, nonetheless concluded that it was instrumental in its aims, policy making in its decisions, and committed to enhancing the rights of historically underepresented groups.<sup>3</sup> This liberal, instrumental interpretation held that the Warren Court shared a general commitment to social ends such as efficiency, humanitarianism, equality of economic opportunity, and equal treatment before the law. According to this interpretation, the Warren Court was an engine of modern liberal reform

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- 1. ANNIE HALL (United Artists 1977).
- 2. GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 409 (1977).
- 3. MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT (1964); Shapiro, *The Constitution and Economic Rights, in* Essays on the Constitution of the United States (M. Judd Harmon ed., 1978); Shapiro, *Judicial Activism, in* America in the Twenty-First Century (S. Lipset ed., 1979); Shapiro, *The Supreme Court: From Warren to Burger, in* the New American Political System (Anthony King ed., 1978); Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values, in* The Burger Court: The Counter Revolution That Wasn't (Vincent Blasi ed., 1983); Robert Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279 (1957); Anthony Lewis, *Earl Warren, in* 4 Leon Friedman & Fred L. Israel, The Justices of the United States Supreme Court (1969); Lewis, Gideon's Trumpet (1964); Lewis, Make No Law (1991); Archibald Cox, The Warren Court (1968); Cox, The Role of the Supreme Court in American Government (1976); Bernard Schwartz, Super Chief (1983); G. Edward White, Earl Warren: A Public Life (1982).

powered by a substantive jurisprudence that stressed results and gave only modest attention to *polity* principles.

Three schools of revisionist scholarship have sharply challenged this liberal-instrumentalist view. Conservatives argue that political bias and problematic scholarship characterized the Warren Court. Gary McDowell and Raoul Berger, among others, condemn Warren and his colleagues for faulty constitutional reasoning, a muddled reading of the founding generation and its fidelity to the Constitution, and usurpation of legislative authority.<sup>4</sup> The conservatives agree with the liberals that the Warren Court was instrumental, but they insist that this instrumentalism had ruinous results, both in terms of public policy and the authority of the Court. The Justices, according to these scholars, ran amuck in their own liberalism and welfare stateism.

A second body of scholars, the so-called civic republicans, view the Warren Court from a perspective at once sympathetic with, yet critical of, the Justices. Michael Perry, Mark Tushnet, and Sanford Levinson, for example, while differing on the particulars, agree that there is no necessary connection between constitutional choices and good moral values, and that each choice, therefore, must be analyzed with regard to moral theory and outcomes.<sup>5</sup> This view holds that politics and law should not be based on raw power and preferential self-interest; instead, it posits that both should respond to and protect the public good.

The civic republicans take exception to the level of success achieved by the Court and to the grounds upon which the liberal majority rested its position. If anything, the Warren Court acted *too* instrumentally, failing to anchor its policy positions in concern about the common good and in exalting individual rights at the expense of community interests. The Warren Court erred because it presumed to do those things in politics which its power, and the power of any judicial body, could never reach legitimately. According to the civic republicans, the appropriate means of social transformation resides in the political branches, and not in the courts.

A third revisionist interpretation not only blends elements of the other two, but succeeds in standing the Warren Court on its head in doing so. This "constitutive" interpretation asserts, with a remarkable historical flourish all too familiar in much of the scholarship dealing with modern constitutional jurisprudence, that "[i]t is important to note that the Warren Court's genius was not of its own making." Ronald Kahn, for example, argues that the Warren Court was neither concerned with rights nor due process; instead, its approach was "constitutive," not "instrumental." The Justices of the Warren Court well understood the limits of their powers and realized that their most important task was to find the best way to constitute the political and legal communities, to take doctrinal debates seriously, and to disregard the pressure of the ballot box for such change. The Warren Court, it turns out, really was not politically motivated; instead, it was overwhelmingly a legal institution, one in which the rule of law—the Constitution,

<sup>4.</sup> Gary L. McDowell, The Constitution and Contemporary Constitutional Theory (1985); Raoul Berger, Government by Judiciary (1977).

<sup>5.</sup> MICHAEL J. PERRY, MORALITY, POLITICS AND LAW (1988); MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

<sup>6.</sup> RONALD KAHN, THE SUPREME COURT AND CONSTITUTIONAL THEORY (1994).

precedents, and fundamental rights and legal principles—influenced judicial decisionmaking. The Warren Court fashioned only modest adjustments in the constitutional landscape and its most important contributions were only fully realized under the leadership of Warren's successor, Warren Burger. The constitutive interpretation, by focusing so fully on constitutional theory and jurisprudence, drains the Warren Court of life.

These revisionist interpretations tend to diminish the Warren Court's stature and to deny the singular nature of social and political change in the 1950s and 1960s. They rob the Warren Court of either its legitimacy or its energy, and in some cases both. Kahn, for example, tells us that in the past quarter century life has become more complex, leaving a sense that the Warren Court in some ways faced a challenge less daunting than does our own time. The conservatives crudely argue bad faith and a lack of principle on the part of the Justices. The civic republicans admire the Warren Court's efforts but find the Court unable to offer a coherent theory of constitutional politics.

No doubt each of these views has some merit, yet each of them make the Warren Court something less than the major historical force it was. On this twenty-fifth anniversary of Earl Warren's retirement, it seems appropriate to shift our attention from matters of theory and jurisprudence and recall what the Warren Court did—to put it in historical perspective. One of the best ways to do so is by listening to the times *and* by heeding what contemporary critics of the Justices, like Richard Nixon, had to say.

#### II. THE WARREN COURT IN THE HISTORY OF THE SUPREME COURT

Perhaps nowhere is such an approach more important than on the simple question of whether the Warren Court really existed. A good number of revisionist scholars apparently have doubts. Some scholars have not only questioned the proposition that there was a Warren Court, but have concluded that naming Supreme Court epochs after Chief Justices is problematic at best and misleading at worst. There has often been considerable overlap in the Associate Justices on the Court even after the Chief leaves the bench. More than seventy percent of all Associate Justices appointed to the High Court outlast the Chief Justice serving at the time of their appointment. That was certainly the case with the Warren Court. Of the eight Associates appointed during Warren's term, only one, Charles Whittaker, left before Warren's retirement. Two leading scholars take the position that the Warren Court should be called the Brennan Court. Hutchinson argues that "[t]o the extent that the Court over which Warren presided has any intellectual legacy that is accessible to those trained in doctrine and not in ethics, it is Brennan who is responsible." Robert Post proposed that the Warren years really should be called the "Brennan Court" era because Associate Justice William Brennan, who only missed participating in one landmark decision, Brown v. Board of Education,8 outlived Warren and was the most effective banner carrier for liberal jurisprudence from the 1960s to the early 1990s.9

<sup>7.</sup> Dennis Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 924 (1983).

<sup>8. 349</sup> U.S. 294 (1955).

<sup>9.</sup> Hutchinson, supra note 7, at 924; Robert C. Post, Justice William J. Brennan and the Warren Court,

Some Chief Justices did not stay long enough to have much of an impact on the Court. Such was certainly the case with John Jay, John Rutlege, and Oliver Ellsworth early in the history of the Court; the same was true with Harlan Fiske Stone and Fred Vinson more recently. Chief Justices can also stay too long; their influence becomes diminished when transformations in the political culture bring appointees to the Court either not of the same political generation nor of the same ideological views as the Chief. Both John Marshall and his successor, Roger B. Taney, faced similar fates because Andrew Jackson, in the case of the former, and Abraham Lincoln, in the case of the latter, placed members on the High Court whose views were radically at odds with those of the Chief Justice. By the time of their deaths, both Marshall and Taney had essentially lost control of their respective courts. Both of these Chief Justices served more than double Warren's sixteen years on the bench.

Warren's term as Chief Justice was about average, and, even more importantly, he had enormous good luck in the way that appointments fell during his time on the bench. Within three years of taking the position of Chief Justice, the composition of the Court underwent radical change. Four of the Associate Justices left: Stanley Reed, Robert H. Jackson, Harold H. Burton, and Sherman Minton. Either Presidents Franklin D. Roosevelt or Harry Truman appointed all of these Justices. None of them, with the exception of Jackson, was much of a force on the Court. Their replacements were not only more talented jurists but political moderates of a comparable if not quite similar ideological stripe to that of Warren.<sup>11</sup>

This ideological continuity was a central feature of the Warren Court, and its presence, along with Warren's leadership, helped to define the era. Republican President Dwight Eisenhower made four appointments to the bench in addition to Warren. He selected John Marshall Harlan, III, in 1955, William J. Brennan, Jr., in 1956, Charles Whittaker in 1957, and Potter Stewart in 1958. Only Harlan and Stewart emerged as anything like the representative voice of the constituency that elected Ike. Brennan became an important liberal voice on the Court; Whittaker served only four years. Byron White, one of President Kennedy's two appointments to the High Court, replaced Whittaker. Eisenhower concluded that in the cases of Warren and Brennan, he had made his two biggest political mistakes. Even Harlan was a moderate conservative. The other appointments were all made by Democratic presidents and the major holdovers, Hugo Black, William O. Douglas, and Felix Frankfurter, were selected by Democratic President Franklin D. Roosevelt. In short, there was a strong ideological predisposition in favor of liberal instrumentalism that came to typify the Warren Court. 12

<sup>8</sup> CONST. COMMENTARY 11 (1991) reprinted in THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 123 (Mark Tushnet ed., 1993).

<sup>10.</sup> The best historical discussion of the office of Chief Justice is contained in ROBERT J. STEAMER, CHIEF JUSTICE 219-57 (1986). Concerning the effect of a too-long tenure on Marshall and Taney, see KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 26, 89 (1968).

<sup>11.</sup> Henry J. Abraham, Justices and Presidents 251-295 (3d ed. 1992).

<sup>12.</sup> Id. There was greater ideological continuity on the Warren Court than on the Court under Burger although they shared many of the same values. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 331 (1993); Vincent Blasi, The Rootless Activism of the Burger Court, in The Burger Court (Vincent Blasi ed., 1983).

Warren's contribution to the Court was his ability to lead this liberal majority toward important changes in public policy. If he had not done so, then the case for the Warren Court would be less persuasive. His major biographer, G. Edward White, explained that Warren succeeded through his leadership in investing "his Court with a discernible character, if not necessarily a coherent jurisprudence."<sup>13</sup>

Scholars today disagree about what attributes contribute to the success of a Chief Justice. Some argue that technical proficiency in the law is more important than result orientation. For example, many students of the High Court believe Charles Evans Hughes was the greatest Chief Justice of the twentieth century because he commanded his colleagues by force of intellect and technical legal ability. Justice William O. Douglas concluded that in sheer legal talent "Warren was closer to Hughes than any others. Burger was close to Vinson. Stone was somewhere in between." Hughes, however, exercised that leadership through a photographic memory, authoritative demeanor, and personal charisma. Hughes, according to Stone, conducted conferences "much like a drill sergeant."

Warren shaped and defined his court in an entirely different way. His style was reminiscent of John Marshall, who depended on charm, an even temperament, an ability to have others warm to him, and on a vision of the Court's role.<sup>17</sup>

Warren, however, was not a legal scholar; he was a former governor and district attorney. He was a "politician, a big bear of man with great personal charm." Justice Potter Stewart once commented that "[w]e all loved him."

Warren also possessed great self-confidence. Initially, he relied on this quality to compensate for his lack of experience with the High Court, and it served him well throughout his tenure, especially in dealing with Felix Frankfurter who tried and ultimately failed to bring Warren under his influence. Warren turned Frankfurter's imperious style to his advantage by successfully building strong personal relations with the other Justices, most notably William J. Brennan.<sup>20</sup> Warren was smart enough to understand that he and Brennan shared similar views on important matters and that together they were likely to build the level of support necessary to reach those goals on the High Court. Commentators today, who concentrate on Brennan's twenty-year career after Warren retired, tend to read too much into the relationship when the two of them were on the Court together.<sup>21</sup> Like Brennan, Warren shared a result-oriented view of the Court's business.

- 13. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 318 (1976).
- 14. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 186-89 (1986).
- 15. Id. at 186 (quoting WILLIAM O. DOUGLAS, THE COURT YEARS 223, 226, 227 (1980)).
- 16. Id. at 187 (quoting memorandum of Howard Westwood, Stone Papers, Box 48, LC).
- 17. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 365-75 (1988).
- 18. O'BRIEN, supra note 14, at 188.
- 19. O'BRIEN, supra note 14, at 188.
- 20. Warren took to the practice of consulting with Brennan on the Thursday preceding the Friday conference. O'BRIEN, *supra* note 14, at 188.
- 21. G. Edward White, Earl Warren's Influence on the Supreme Court, in THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 37, 46 (Mark Tushnet ed., 1993). The case for Brennan's role is made most forcefully by Hutchinson, supra note 7; Post, supra note 9.

Warren left his mark on the Court in other ways. In managing the case load, for example, he concentrated on forging majorities. To do that he successfully directed the energy that came from the clash of competing jurisprudential attitudes wrapped up in strong personalities such as Felix Frankfurter, William Douglas, and Hugo Black.

Although the Court had a liberal majority, it did not follow that the Justices readily agreed with one another. To the contrary, dissent rates continued the steady rise that had begun during the chief justiceship of Harlan Fiske Stone.<sup>22</sup> There was no intellectual leader on the Warren Court, we should remember; instead, several strong figures, Black, Douglas, Frankfurter, Harlan, and Goldberg, stood in uneasy coexistence. Warren's challenge was to mold this talented but frequently quarrelsome group.

Warren did so through his power to assign opinions. "During all the years," Warren observed in retirement, "I never had any of the Justices urge me to give them opinions to write, nor did I have anyone object to any opinions that I assigned to him or anyone else."<sup>23</sup>

Warren made his Court work through consultation and an evenhanded distribution of opinion writing. Unlike John Marshall, who dominated his brethren by writing the bulk of his Court's opinions, Warren led through collaboration, often using the assignment of opinions as a way of guiding the Court.<sup>24</sup> Nowhere was the success of this approach more apparent than in *Baker v. Carr*,<sup>25</sup> a 1962 decision that Warren believed to be more important than any other during his time on the Court. The opinion was written by Justice Brennan, but had Warren's influence stamped all over it. Moreover, Warren assigned the opinion to Brennan because he was urged to do so by Black and Douglas, both of whom believed that Brennan's views were closer to those of Potter Stewart, the necessary fifth vote for a majority.<sup>26</sup>

When placed in historical perspective, Warren emerges as perhaps the most persuasive and persistent Chief Justice the Court has ever had. Warren was not a great lawyer in the mold of Taney or Hughes, not a great legal scholar like Brandeis or Frankfurter, not a supreme stylist like Cardozo or Jackson, not a judicial philosopher like Holmes or Black, not a resourceful, efficient administrator like Taft or Burger. Nonetheless, he was the most important presence on the Court from 1953 to 1969; that is why it is fair to name the Court of this period after him. He was second in institutional leadership only to Marshall, at least as measured by impartial critics of the Court.<sup>27</sup> As Henry Abraham wrote, Warren "was his court, *the* judicial activist Court."

If it is fair to claim the existence of the Warren Court, then it is also appropriate to note that, like other eras of the Court's history, the Warren period had its own phases. There were, in fact, two Warren Courts. During the first phase, from 1953 to 1962, the

<sup>22.</sup> William J. Dixon, On the Mysterious Decline of Consensual Norms in the United States Supreme Court, 50 J. Pol. 361 (1988).

<sup>23.</sup> O'BRIEN, *supra* note 14, at 247.

<sup>24.</sup> NEWMYER, supra note 10, at 24.

<sup>25. 369</sup> U.S. 186 (1962).

<sup>26.</sup> O'BRIEN, supra note 14, at 247.

<sup>27.</sup> ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES 45 (1978); ABRAHAM, supra note 11, at 259.

<sup>28.</sup> ABRAHAM, supra note 11, at 259.

Court did not have a major public presence with the notable exception of *Brown* v. *Board of Education*.<sup>29</sup> In those years an imperfect match existed between the public perception of the Warren Court as liberal, largely because of its decisions in race related cases, and the day-to-day reality. The Court Warren inherited from Fred Vinson at the beginning of the 1953 term was not liberal in the realm of civil liberties. The early Warren Court was indifferent to the rights of the accused in state courts and inconsistent in its protection of First Amendment rights.<sup>30</sup> Moreover, not until the 1961 term did the Court begin to take such matters seriously. From 1953 to 1961 the Court's percentage of liberal civil rights and liberties decisions ranged from a low of forty-seven percent in 1953 to a high of sixty two percent in 1954. Following the 1960 term, in which fifty-four percent of these cases were decided liberally, the proportion jumped to eighty percent in the 1961 term and remained in the seventies or above for six of the remaining seven years of the Warren Court.<sup>31</sup>

This dramatic shift in the early 1960s is almost universally recognized, but explanations vary about why it occurred. The conventional wisdom ascribes the shift to the appointment of Goldberg at the beginning of the 1962 term.<sup>32</sup> The major changes in the Court's direction came because of the incapacity suffered by Justice Frankfurter as a result of a stroke and the mid-term retirement of Justice Whittaker, both developments that shifted influence to Justice Stewart.<sup>33</sup>

After the 1962 term, the Warren Court emerged as the powerful institution of liberal change against which Nixon and others railed. The Court routinely took a strong liberal position in eighty percent of civil liberties cases.<sup>34</sup>

The Warren Court was distinctive in another way. The majority of its Justices invariably adopted innovative approaches to major constitutional controversies. Warren and at least four of his colleagues, Douglas, Brennan, Fortas, and Marshall, had little sustained interest in general matters of constitutional theory. Such behavior, while not unique, certainly stood out from the practices of the nineteenth century, when Justices such as Joseph Story, Joseph Bradley, and Stephen J. Field persisted in a longstanding quest to rationalize the Court's actions with acceptable constitutional theory. The Warren Court Justices were remarkable for their lack of concern about the era's main currents of constitutional thought. Warren did not agree, he wrote in his memoirs, "with the so-called doctrine of 'neutral principles.' It . . . is a fantasy," he continued, "and is used more to avoid responsibilities than to meet them. As the defender of the Constitution, the Court cannot be neutral . . . ."<sup>35</sup> The great controversy over incorporation, which brewed throughout the Warren Court era, was evidence enough of precisely that lack of concern. <sup>36</sup>

<sup>29. 349</sup> U.S. 294 (1955).

<sup>30.</sup> See, e.g., Breithaupt v. Abram, 352 U.S. 432 (1957); Watkins v. United states, 354 U.S. 178 (1957); Barenblatt v. United States, 360 U.S. 109 (1959).

<sup>31.</sup> Jeffrey A. Segal & Harold J. Spaeth, Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project, 73 JUDICATURE 103, 104 (1989).

<sup>32.</sup> Id. at 104 n.6.

<sup>33.</sup> Id. at 104.

<sup>34.</sup> *Id*.

<sup>35.</sup> EARL WARREN, THE MEMOIRS OF EARL WARREN 332-33 (1977).

<sup>36.</sup> Mark Tushnet, The Warren Court as History, in THE WARREN COURT IN HISTORICAL AND

In this setting, the role of a Justice was to figure out the right answer, as a matter of public necessity and not some abstract theory of justice. Underlying this approach was the belief that the Constitution was a living document, and that the Justices had a responsibility to facilitate its evolution and development.<sup>37</sup> Such a view set the Warren majority in sharp contrast with its predecessors, especially those eras of the Court's history that had stressed their formalist role. At the same time, the Warren Court was also notable because it managed to shift the emphasis in the developmental character of the Constitution to one that stressed individual rights.

Like Courts of other eras, the Warren Court had a reciprocal and reinforcing relationship with its own times. It reflected much of the sympathies of the New Dealers; and its liberal policies extended beyond the period of Earl Warren's chief justiceship. Still, there was without a doubt a Warren Court, an identifiable judicial entity of which we can make sense and which was distinctive in the overall history of the Supreme Court.

## III. THE WARREN COURT AND ITS TIMES

Throughout American history, constitutional law has developed in constantly changing dialogue between the Court and the country, and the Warren Court was no exception. For example, the Warren Court did not discover the issue of race and its pernicious effects on American life. That matter had been part of the original constitutional understanding, an understanding earlier Justices had enforced by countenancing first slavery and then, following the Civil War, a system of de jure segregation. By the 1930s, however, the Court had begun the tortured process of reexamining its previous decisions in this area, not so much because it wished to do so but because the newly created National Association for the Advancement of Colored People pressed it to do so. To that extent, the Warren Court's great decision in Brown v. Board of Education<sup>38</sup> built upon and expanded a line of constitutional development begun much earlier.<sup>39</sup> At the same time, it contributed to the constitutional elaboration of race issues during the remainder of the Warren Court and beyond. Much the same can be said in other areas of constitutional law, notably the rights of the accused, First Amendment free expression and religion cases, and the development of the idea that the political thicket was, in the end, not nearly as thorny as previous courts had believed. Each of these areas of major Warren Court constitutional development had been cultivated by earlier Courts, and once these areas were treated by Warren and his colleagues, they contributed to developments in American society.

POLITICAL PERSPECTIVE 18 (Mark Tushnet ed., 1993).

<sup>37.</sup> Morton J. Horwitz, The Warren Court and the Pursuit of Justice, 50 WASH. & LEE L. REV. 5 (1993).

<sup>38. 349</sup> U.S. 294 (1955).

<sup>39.</sup> Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938) (denial of admission to law school); Mitchell v. United States, 313 U.S. 80 (1941) (exclusion from Pullman berth); Shelley v. Kraemer, 334 U.S. 1 (1948) (restrictive covenant); Henderson v. United States 339 U.S. 816 (1950) (exclusion from railroad dining car); Sweatt v. Painter, 339 U.S. 629 (1950) (segregated law school); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (segregated graduate school); Brown v. Board of Education, 347 U.S. 483 (1954) and 349 U.S. 294 (1955).

To recognize that the Warren Court built on the work of its predecessors merely underscores that it is in such ways that the Court works. The Warren Court stood out, however, because in each of these areas it brought about a resolution of existing law that was at once transformative and liberating.

In an era in which political outsiders pressed their case with more energy than ever before, the Warren Court responded. Doing so made it distinctive in the history of the Court, and, for the first and only time, the Justices empathized with the concerns of social and political outsiders. The Court, of course, has had a long history of protecting minority rights, but in most instances that protection has been aimed at property rights rather than at human rights. In this way, the Warren Court was notable because it concluded that discrimination was not a random, individualized act but a governmentally supported set of social preferences structured along cultural lines. Warren and his liberal colleagues were eager to attack the concept of state action through the incorporation doctrine because they realized that by doing so they held the power to redefine political and social relationships in favor of those who had previously been disadvantaged.

The Warren Court was very much *in*, not outside the stream of history, as some revisionist scholars are prone to argue. The Justices operated in a political culture in which big government had been accepted, indeed embraced. To suggest that this environment was in any meaningful way less complex and demanding than our own so woefully misses the point as to trivialize much contemporary history. The rise of legislative and executive power over economic matters was one of the enduring legacies of the New Deal, a legacy that remains firmly in place today and that shaped the actions of not only Warren but those of his colleagues and the litigants that appeared before them. It is also the source of much that is perplexing in modern economic life.

President Franklin Roosevelt's shock treatment in the Court-packing plan left little doubt that the Justices no longer had broad support to intervene in economic matters. It was a lesson learned by successor courts, especially the Court over which Warren presided. Between 1953 and 1969 the Court did not declare a single piece of federal legislation regulating property unconstitutional, and it invalidated only a few state laws regulating industry and providing welfare programs as interferences with contract or property rights. While revisionists such as Kahn have made it fashionable to believe that the High Court does not read the election returns, there is ample evidence that the post-New Deal Court, including that of Earl Warren, had no interest in refighting the battle of property rights, since that battle had been conceded to the legislative branch and the administrative state.<sup>40</sup>

The Warren Court, however, was a product of its time, just as were previous courts. What was embarrassingly obvious was that economic security, at least the level of security envisioned by the New Deal, was overly optimistic. The problem of raising the level of political and social rights, however, required an effort similar to that made by the federal government in securing economic rights. It also presented an entirely different, and in many ways more complicated, problem than revisionists admit, given the nation's prevailing class and race relations. Where government had exercised its authority in the past, it had done so in a way to promote differences and discrimination, whether through segregation, the poll tax, state-sanctioned religious practices, or limits on speech and

press. At the time of the Warren Court, these practices were deeply embedded and entirely supportive of the existing political and social order. The quest to enhance social and political rights was a uniquely judicial and legal task, since the existing centers of political and social power were unlikely to change their behavior without some pressure. The Warren Court responded to this challenge by clearing out a legal thicket of archaic interpretations that were simply not going to be swept away through elected democratic practices.

In retrospect, conservative critics of the Warren Court argue that it should not have done what it did because it usurped power either from the other federal branches or from state and local governments.41 Yet here again the Warren Court Justices inherited an institutional legacy that encouraged them to embrace controversial issues that could not find resolution elsewhere in the governmental structure.<sup>42</sup> Previous courts had been disposed more often than not to resolve such matters in favor of property rights and community rather than individual interests. For example, meaningful racial integration of public schools and other public facilities could not be achieved without removing the standing gloss of "separate but equal" on the Equal Protection Clause of the Fourteenth Amendment. 43 Congress had great difficulty accepting the limited civil rights measures proposed by the Truman administration, none of which even came close to addressing the issue of segregation. Congress was not likely to strike down local laws designed to muzzle protestors seeking a new level of individual rights nor to address, under the First Amendment, protection for religious minorities. The literal wording of the First Amendment made clear that Congress was explicitly prohibited from doing so. There was no way under existing political arrangements that Congress was going to break the longstanding practice of rural domination of state legislatures. As a matter of constitutional law and practice, crime control and policing had historically been left to state, and especially local, officials. Practices varied widely from state to state, and more often than not, varied in quality within these areas based on the races of the victims and the accused.

Perhaps as important, the Court was operating within the structure of its own constitutional purposes. Revisionists have fastened on the Warren era as the most blatant example of runaway judicial activism. The result, they insist, was the rise of an imperial judiciary.

Yet the Court had historically performed the role of construing established statutes and legal language in the context of both initial meaning, so-called original intent today, and current societal demands. The results were simply different in the Warren era. When, for example, Chief Justice Roger B. Taney and his colleagues held in *Dred Scott* that no person of African American heritage could be a citizen of the United States,<sup>44</sup> they were

<sup>41.</sup> See sources cited in supra note 4. Warren was quick to dump cold water on the notion that the justices did the bidding of the public. "Every man on the Court must choose for himself which course he should take.... To habitually ride the crests of the waves through the constantly recurring storms that arise in a free government, always agreeing with the dominant interests, would be a serene way of life.... As tempting as that might be, I could not go that way." WARREN, supra note 35, at 332.

<sup>42.</sup> Richard Funston, *The Supreme Court and Critical Elections*, 69 Am. Pol. Sci. Rev. 795 (1975); William Lasser, The Limits of Judicial Power (1988).

<sup>43.</sup> Plessy v. Ferguson, 163 U.S. 537 (1896).

<sup>44.</sup> Scott v. Sandford, 60 U.S. 393 (1857).

greeted with a uniform chorus of condemnation by Abraham Lincoln and the Republican Party for usurping power through judicial law making.<sup>45</sup> Many more Democrats, however, applauded Taney's boldness. Hence, the Warren Court was able to move legitimately toward assuring the values of equality, fairness, natural justice, and morality in individual and public relationships because the history of the Court had long since established that it could do so.

Warren and the majority of the Court also took seriously the duty imposed on them by their oath of office to "administer justice without respect to persons, and do equal right to the poor and to the rich." Such a position, however, stirred one or another group to condemn most of the Court's landmark decisions. These changes in the direction of the Warren Court were important, and they belie the notions put forth by some that, on balance, the Warren Court Justices were not really liberal at all or, at the same time, that the Justices had, to cite the famous *Southern Declaration on Integration*, "undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land." First its critics, and then many scholars, made a caricature of the High Court.

In the wake of *Engel v. Vitale*, <sup>48</sup> for example, Representative George W. Andrews of Alabama asserted: "They put the Negroes in the schools, and now they've driven God out." Representative L. Mendell Rivers of South Carolina asserted that as a result of *Engel* the Court "has now officially declared its disbelief in God." 50

These protests seem not to have phased Warren and his colleagues. Legal scholars particularly have given so much attention to the jurisprudential workings of the Warren Court that they have often missed the obvious literal-mindedness and courage of the liberal majority and especially of its Chief Justice. America had historically professed ideals of equality, fairness, and justice. Why shouldn't such ideals be supported in constitutional law and through the actions of the Supreme Court? "So many times in life," Warren wrote, "the only permanent satisfaction one can find comes from bucking an adverse tide or swimming upstream to reach a goal." While some scholars have perhaps gone too far in arguing that the Warren Court was committed to a scheme of equitable jurisprudence, there is little doubt that the Warren Court majority believed that early generations of Americans had, at best, given lip service to these concepts and that it was appropriate, at this juncture in the nation's history, for the Justices to end the process by which such ideals had been compromised, qualified, and even destroyed. 52

<sup>45.</sup> DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); HAROLD M. HYMAN & WILLIAM M. WEICEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875 at 190-92, 196-97 (1982).

<sup>46.</sup> WARREN, supra note 35, at 332.

<sup>47.</sup> Southern Declaration on Integration, March 12, 1956 reprinted in AMERICAN LEGAL HISTORY: CASES AND MATERIALS 514-15 (Kermit Hall et al. eds., 1991).

<sup>48. 370</sup> U.S. 421 (1962).

<sup>49.</sup> LEO PFEFFER, THIS HONORABLE COURT 421 (1965).

<sup>50.</sup> Id. at 422.

<sup>51.</sup> WARREN, supra note 35, at 332.

<sup>52.</sup> PETER HOFFER, THE LAW'S CONSCIENCE 2-6 (1990).

In many ways, this strain of Warren Court commitment—to the reconciliation of professed values with behavior—did more than anything else to stir the ire of its critics, many of whom believed that they were being blamed for having benefitted from such hypocrisy. The Court's actions placed it squarely at odds with one of the central contradictions of the American experience, one too often ignored.<sup>53</sup> The majority of Americans had come to embrace the contradiction between theory and practice in many areas of life. Although millions of Americans professed this belief in freedom, liberty, and equality, they simultaneously abstained from conducting themselves according to these rules of moral behavior. In responding to this contradiction, the High Court initiated an extended educational dialogue with the American public about the extent of the Justices' responsibility to first recognize and then resolve the tension between moral thought and actual conduct.

The Warren Court's revolution in public law promoted acrimony and bitterness precisely because it empowered those who had previously not had the opportunity to exercise power. Whether we approve of their behavior or not, there is little doubt that these new groups added dramatic and often disturbing wrinkles to the contours of American society. Much of what the Warren Court did was to release dissident minorities from longstanding legal and social strictures. Critics complained that the Court was the root of the problem; it was fostering subversive action by civil rights advocates, Communist agitators, criminals, smut peddlers, and racketeers who avoided accountability by hiding behind the Fifth Amendment.

One of the more interesting yet unexplored aspects of the Warren Court was the extent to which the Justices themselves appreciated the consequences of their actions. While we can embellish the Court's actions by labelling the Justices as either interpretivists or noninterpretivists, as originalists or non-originalists, or as advocates of constitutive or polity theories of governance, the inescapable fact is that they knew what they wanted, and, often times, if they did not exactly achieve it, they came close. For example, in the case of *New York Times* v. *Sullivan*,<sup>54</sup> Hugo Black asked the counsel for three white city commissioners from Montgomery, Alabama if he could seriously argue that a newspaper advertisement by the supporters of Martin Luther King, Jr., which called into question Lester B. Sullivan's public conduct, would actually hurt him with his all-white political supporters.<sup>55</sup> The Court ultimately held that Sullivan had not been libeled as a matter of constitutional law and practical politics.

Nor was Warren so naive as to believe that what he and his colleagues wanted could be accomplished without controversy. "Every man who has sat on the Court," Warren wrote in retirement, "must have known at the time he took office that there always has been and in all probability always will be controversy surrounding that body." Warren continued:

Accordingly, I venture to express the hope that the Court's decisions always will be controversial, because it is human nature for the dominant group in a nation to keep pressing for further domination, and unless the Court has the fiber to

<sup>53.</sup> MURPHY, *supra* note 40, at 462-63.

<sup>54. 376</sup> U.S. 254 (1964).

<sup>55.</sup> LEWIS, MAKE NO LAW, supra note 3, at 151.

accord justice to the weakest member of society, regardless of the pressure brought upon it, we never can achieve our goal of 'life, liberty and the pursuit of happiness' for everyone.<sup>56</sup>

This goal, of course, is articulated in the Declaration of Independence and not the Constitution.

The constitutional revolution unleashed by the Court created serious problems which are still echoed in today's debates about the High Court. The exercise of judicial power to achieve social goals opened the Court to charges that it had departed from its traditional role and had become primarily a legislative body. In essence, critics charge, the unelected Justices substituted their views for those of elected and therefore properly representative legislators. Such an argument misses the point that many of these issues were beyond the grasp, either by law or by force of will, of the political branches of government.

Yet the Warren Court was often on shaky ground when it attempted to justify its conduct. The great English legal historian Sir William Holdsworth once wrote that "for certainty in the law, a little bad history is not too high a price to pay." Warren and his colleagues perhaps too frequently followed Holdsworth's advice. The Justices were wildly bad historians, so misreading the historical record on such matters as freedom of conscience and race relations as to call into question the soundness of their approach to these matters. Even worse, the Justices frequently argued the fine points of history with one another and, in the process, added to the sense of illegitimacy that accompanied several of their boldest pronouncements. They were no worse than their predecessors in using history, just more persistently bad at doing so.

The arguments among the Justices about history easily spilled over into serious disagreements about the nature of the judicial process and the scope of judicial review. Today we are prone to minimize the sharp debates between Black and Frankfurter over judicial activism and judicial restraint, doing so in favor of seemingly more sophisticated ideas such as originalism, noninterpretivisim, and constitutive jurisprudence. Throughout the 1960s, a majority of the Warren Court supported judicial activism, even to the point that the activists had themselves come to disagree about what they could and could not do. President Lyndon Johnson's decision to replace retiring Chief Justice Warren with Abe Fortas underscored the extent to which the Court had moved toward an activist role that included direct involvement by Fortas in the day-to-day business of the White House while he was a sitting Justice. 60

Still, a critical minority on the bench, led by Justice Harlan, complained repeatedly that his brethren acted far beyond the traditional and understood boundaries set for Justices in our constitutional system. Harlan explicitly warned that recent history demonstrated the virtues of judicial restraint. Harlan and others argued that the Supreme

<sup>56.</sup> WARREN, *supra* note 35, at 334-35.

<sup>57.</sup> HOLDSWORTH, ESSAYS IN LAW AND HISTORY 24 (1946).

<sup>58.</sup> See, e.g., the debate between Frankfurter and Black over religion in Engel v. Vitale, 370 U.S. 421 (1962); see also Charles Miller, The Supreme Court and the Uses of History 100-148 (1969).

<sup>59.</sup> See supra notes 3-6.

<sup>60.</sup> O'BRIEN, *supra* note 14, at 125-133; LAURA KALMAN, ABE FORTAS 310-18 (1991); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 270-73 (Kermit Hall ed., 1992).

Court before 1937 demonstrated repeatedly what the Justices should not do: interfere in areas that were properly not theirs to begin with.

Even more fundamental to this critique was the view that such interference actually sapped the democratic process of its vitality. It bred a sense of distrust in popular elected forms of government while placing too much trust in a judiciary that lacked the means even to command obedience to its decisions and that made its decisions in secret.<sup>61</sup> Felix Frankfurter explained in his dissent in *Baker v. Carr* that "[d]isregard of inherent limits in the effective exercise of the Court's 'judicial power' may well impair the Court's position as the ultimate organ of 'the supreme Law of the land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce."<sup>62</sup> Justice Harlan added an additional note when taking exception to the Court's later decision in *Reynolds* v. *Simms*, which introduced the concept of "one person, one vote." Harlan wrote:

These decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act.<sup>63</sup>

Earlier Chief Justice Harlan Fiske Stone and Justice Robert H. Jackson had warned against the Court taking on too great a role. Jackson summed the matter up neatly by observing that a "4,000-word eighteenth-century document or its nineteenth-century Amendments" could not provide "some clear bulwark against all dangers and evils that today beset us internally." 64

Faced with this attack, the majority on the Warren Court found it necessary to offer a different explanation for its actions. Chief Justice Warren, for example, insisted that the Court merely acted at the call of those parties bringing cases before it. Warren stated:

There are many people, and I fear some lawyers, who believe that whenever the Court disapproves of some facets of American life, it reaches out and decides the question in accordance with its desires. We can reach for no cases. They come to us in the normal course of events or we have no jurisdiction.<sup>65</sup>

Justices Black and Douglas made clear, as well, that they were not going to be bound by precedent, and their attitude toward it fostered even more contention. For example, in the case of *Gideon* v. *Wainwright*, Harlan pleaded with the majority, which included Black and Frankfurter, that by refusing to abide by precedent the Court refused to recognize that in most matters it was more important that the applicable rule of law be settled than that it be settled right.<sup>66</sup>

<sup>61.</sup> TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN 149-53 (1992).

<sup>62. 369</sup> U.S. 186, 267 (1962).

<sup>63.</sup> Reynolds v. Simms, 377 U.S. 533, 620 (1964).

<sup>64.</sup> ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 57-58 (1955).

<sup>65.</sup> LEO KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 452 (1967).

<sup>66. 372</sup> U.S. 335 (1963). While Harlan was willing to overrule precedent, he believed it deserved at

The Warren Court had little difficulty finding new areas to explore. To many of Warren's critics, his belief that the Court merely waited for cases to come to it was disingenuous. After all, the Warren Court revolution was not just substantive; it was procedural as well. The Justices significantly loosened such historical limitations on access to it as standing to sue,<sup>67</sup> and, perhaps most dramatically in *Baker v. Carr*, political questions.<sup>68</sup> Placed against this background, the Warren Court majority went well beyond simply responding to the wishes of the litigants.

Warren's argument nonetheless fitted the new reality of the 1950s and 1960s. The Warren Court benefitted from a long term development in which it emerged as the agency most likely to afford protection to minorities that could find no other avenue. Special interest group litigation predated the Warren Court by at least fifty years, but it matured during the 1950s and 1960s. One of the important historical developments of the first half of the twentieth century was the rise of so-called special interest litigation groups that expected to accomplish goals through the judicial process that were otherwise out of reach to them through the political process, susceptible as it was to prevailing shifts in public sentiment.

The American Civil Liberties Union, the National Association for the Advancement of Colored People, the National Lawyers Guild, the National Organization of Women, and various left wing, religious, labor, and ethnic organizations brought test cases designed purposefully to challenge what they believed were impediments to certain individual freedoms and civil rights.<sup>69</sup> Even the Department of Justice, which had pursued civil rights issues infrequently since Reconstruction, began during the Kennedy and especially during the Johnson administrations to press these matters before the federal courts. Moreover, these groups gathered additional incentives from the passage of major legislation, much of it prompted by the actions of the Court itself in the area of civil rights and voting rights in particular.

As judicial activism triumphed on the Court in the 1960s, more and more groups turned to the Justices for solutions. In the area of criminal justice the Warren Court's decisions extending the right to counsel and providing greater scrutiny of the major elements of criminal justice practice resulted in additional litigation before the Court, litigation that forced the Justices to further explain and expand the rationale for controversial landmark decisions.<sup>70</sup>

The Court's activism was both grist for the growing media and a pressure on the Court itself. The Warren Court, we should recall, was the first modern Court in the sense of having its work broadly evaluated for the public and, at the same time, in bringing a sense of humanity and approachability to the institution. Press coverage of the Court soared in the wake of *Brown*, and it never came down. The Court became headline

least a decent burial, especially from members of the Court who were not present when it had been established. *Id.* at 349.

<sup>67.</sup> Flast v. Cohen, 392 U.S. 83 (1968).

<sup>68. 369</sup> U.S. 186 (1962).

<sup>69.</sup> RICHARD C. CORTNER, THE SUPREME COURT AND THE SECOND BILL OF RIGHTS 282 (1981).

<sup>70.</sup> Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966); *In re* Gault, 387 U.S. 1 (1967).

<sup>71.</sup> Brown v. Board of Education, 349 U.S. 294 (1955).

news; it was a subject for nightly reporting on recently created television evening news. Even Justices Black and Douglas agreed to be interviewed at length about their views on the Constitution. Through books, magazines, newspapers, radio, and television, the Warren Court was presented to the world for evaluation and, depending on where one sat on the issue, either praise or condemnation in a way that no previous Court had experienced. The new light of publicity only amplified the already controversial nature of the Court's work.

Measuring public reaction to the Court during these years is difficult. Yet certain themes do emerge. Over time the American public has held the institution of the Court in generally high regard, embracing the need for the Justices at a level of unvarnished understanding that accepts their role without necessarily being able to explain it. The Warren Court inherited a public attitude toward the Court that was framed, at least in part, by the notion that the Justices in the 1920s and 1930s had been biased toward special privilege and vested interests and unwilling to cooperate with Congress during the New Deal to restore economic prosperity. The Court's so-called "switch in time that saved nine" in 1937 began a long term process of changing such attitudes among the citizenry and showing that the Court could be helpful in providing relief from the pressing problems of modern society. Significant aspects of the Court's behavior received strong, but not necessarily uniform, support. The decisions involving equal justice for African-Americans in *Brown* and the sit-in decisions received popular responses. There was also support for the extension of counsel to indigents, for the curtailment of excessive search and seizure and invasion of privacy, and for the end of rural domination of state legislatures.72

However, perhaps as much as any time in the nation's history, controversy and not consensus usually characterized reaction to the Warren Court. In 1968, as the stewardship of Warren drew to a close, the Gallup Poll asked Americans to rate the Supreme Court. The response indicated considerable skepticism: eight percent responded excellent; twenty-eight percent, good; thirty-two percent, fair; and twenty-one percent, poor.<sup>73</sup> The Court was most strongly supported among the young and the well-educated; it was most opposed in the South where its decisions, from race relations to free press to reapportionment, had the greatest impact.<sup>74</sup>

These numbers testify to the continuing suspicion on the part of many Americans about the proper functioning of the Court. Rather than being a force of stability, the Court had become such a powerful instrument of change that it threatened the social fabric. While some of the Warren Court's holdings did receive support, many more of its landmark rulings produced real hostility, disobedience, and even calls for the impeachment of some of the Justices, including Warren. Particularly controversial were the Court's holdings in school prayer cases, pro-Communist speech and protest decisions, its obscenity rulings, and many of its criminal procedure rulings, particularly those that granted new protections to the accused and were, as a result, portrayed as coddling the

<sup>72.</sup> See G. Theodore Mitau, Decade of Decision: The Supreme Court and the Constitutional Revolution, 1954-1964 (1967).

<sup>73.</sup> High Court Found In Disfavor, 3 to 2, N. Y. TIMES, July 10, 1968 at A19.

<sup>74.</sup> *Id*.

<sup>75.</sup> See sources quoted in supra note 4.

criminal element. To many Americans, the nation seemed to be unraveling, and the Court seemingly contributed to that process. While the Justices crafted constitutional decisions that opened the political and social systems, protest over civil rights, major urban rioting, and, by the end of Warren's tenure, dissent against the Vietnam War contributed to the unsettling of American society. The marketplace of ideas, some thought, had become a free-for-all in which obscene and libelous statements had crowded out civility, decency, and respect for authority. To

Moreover, liberal goals came to be mixed with notions of moral corruption, even depravity. Hence, war protestors and pornographers were lumped together as part of the problem of modern American culture, a problem seemingly sponsored by a latitudinarian Supreme Court.

Mobilization against the Warren Court was quite impressive, especially since Americans have repeatedly accorded the Court great respect even as they have taken often bitter exception to decisions that affect their lives. The Warren Court was no exception.<sup>78</sup>

Criticism of the Justices reached its crescendo in the nomination hearings of Associate Justice Abe Fortas to replace Warren. Senator Strom Thurmond of South Carolina asked Fortas in the course of the hearings to justify more than fifty cases decided by the Court involving the rights of the accused and obscenity that covered the entire course of the Warren Court era. Fortas ultimately withdrew from consideration amid disclosures of conflict of interest. Fortas's life seemed to the Court's critics an affirmation of the inherent corruption associated with liberal judicial activism.

Similar resistance came from many state and local officials. Especially in the area of criminal justice procedure, the Warren Court's seemingly radical pronouncements often elevated into the realm of national constitutional protections practices that were already

<sup>76.</sup> ALLEN J. MATUSOW, THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960s at 428 (1984).

<sup>77.</sup> New York Times v. Sullivan, 376 U.S. 254 (1964); Kermit L. Hall, *Justice Brennan and Cultural History:* New York Times v. Sullivan *and Its Times*, 27 CAL. W. L. REV. 339 (1990-91).

<sup>78.</sup> For example, following the Court's decision in *Brown*, most of the southern members of Congress issued a "manifesto" denouncing the decision and the Court. The remedy, according to southerners, was to limit the jurisdiction of the Court, an old chestnut regularly wheeled out against the justices. In 1957 Senator William Jenner of Indiana introduced during the later stages of the debate over the 1957 Civil Rights Act an omnibus anti-Court bill "to limit the appellate jurisdiction of the Supreme Court in certain cases." MURPHY, *supra* note 40, at 332. Jenner claimed that "by a process of attrition and accession, the extreme liberal wing of the Court has become a majority; and we today witness the spectacle of a Court constantly changing the law, and even changing the meaning of the Constitution, in an apparent determination to make the law of the land what the Court thinks it should be." 103 CONG. REC. 12, 806 (1957). So serious was the threat to the Court, that Senator Jacob Javits of New York, a liberal, proposed a law to prevent Congress from interfering with the Court's appellate jurisdiction. 104 CONG. REC. 7807, 7843-50, 9143-45 (1958). Neither measure passed; nor did other efforts by Congressman Howard Smith of Virginia and Senator John M. Butler of South Carolina to limit other parts of the Court's jurisdiction with regard to criminal justice procedures and the ability of the Court to review state legislation, including segregation measures. MURPHY, *supra* note 40, at 332-33.

<sup>79.</sup> Attempt to Stop Fortas Debate Fails by 14-vote Margin, XXIV CONG. Q. ALMANAC 531, 534 (1968).

well-established in the states. <sup>80</sup> In other instances, however, the innovation by the Justices stirred protest from below. Many state political leaders, and not all of them in the South, believed that the Court had become too involved in monitoring their historic functions in areas including voting practices, apportionment, racial segregation, education, censorship, loyalty, and welfare programs. State judicial leaders also expressed their dismay at the Court's criminal justice rulings. The Conference of State Chief Justices in 1958 passed a resolution blasting the Warren Court's "policy-making" and proclaiming that "strong state and local governments are essential to the effective function of the American system of federal government. . . ."<sup>81</sup> Four years later the annual meeting of the Council of State Governments adopted a proposal for "returning the Constitution to the states and the people."<sup>82</sup> That proposal included a plan for the creation, through a constitutional amendment, of a "Court of the Union," comprised of the fifty state Chief Justices, to review the work of the Supreme Court.

Even the American Bar Association, itself an aggregation of local and state bars, contributed to the attack on the High Court. The ABA's House of Delegates refused to endorse the active support given by the Warren Court to sustaining the Bill of Rights, an action which prompted Warren's quiet resignation from that organization.<sup>83</sup>

The political right wing took aim at the Chief Justice and his brethren. The John Birch Society in the late 1950s launched a nationwide campaign to stir popular support for the impeachment of the Chief Justice, a campaign that included billboards sprinkled across the American countryside that simply proclaimed: "Impeach Earl Warren." The Birch Society even sponsored an essay contest with an award to the best paper on the subject: "Grounds for the Impeachment of Earl Warren." The Texas millionaire H. L. Hunt used his fortune to sponsor radio and televisions programs that attacked the Chief Justice and Associate Justice William O. Douglas. The most extreme demands were registered by Fulton Lewis, Jr. and retired Marine Colonel Mitchell Paige, both of whom proposed before public audiences that Warren should be hanged.<sup>85</sup>

#### IV. IN HISTORICAL PERSPECTIVE

Current fashion among many Warren Court scholars holds that its Justices did less than we would have supposed, that in the end it was little different from either its successors or predecessors, and that what achievements it did earn turn out not to have been as significant as once believed. Hence, it is now stylish to think of the Burger Court

<sup>80.</sup> Mapp v. Ohio, 367 U.S. 643, 654 (1961) (holding that evidence obtained by unconstitutional searches and seizures is inadmissible in state courts); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that prosecution may not use statements stemming from custodial interrogation of defendant unless it demonstrates use of procedural safeguards); Gideon v. Wainwright, 372 U.S. 335 (1972) (holding that right of a criminal defendant to counsel is fundamental).

<sup>81.</sup> Murphy, *supra* note 40, at 477 (quoting C. Herman Pritchett, Congress Versus the Supreme Court, 1957-1960 at 141-59 (1961)).

<sup>82.</sup> MURPHY, supra note 40, at 478 (quoting STATE GOVERNMENT, XXXVI 10-15 (Winter 1963)).

<sup>83.</sup> WARREN, supra note 35, at 321-31.

<sup>84.</sup> MURPHY, supra note 40, at 482.

<sup>85.</sup> KATCHER, supra note 65, at 3.

as an extension of the Warren Court and in so doing to denigrate the achievements of the latter. Other commentators have suggested that, in the end, the Court was hypocritical; it did not go as far as it could have in such crucial areas as race relations and gender discrimination. In the former it accepted only "all deliberate speed" and in the latter it simply ignored obvious discrimination against women. Indeed, there is now an effort to demonstrate that Warren and his colleagues really were not politically motivated, that they did not take big risks, and that they were confused in their agenda. There are no good insights, we are once again reminded, only new insights.

Sometimes simple lessons are the most difficult to grasp. The current wave of revisionism surrounding the Warren Court has missed the essential historical point that its liberal majority was important because it had the courage to be in tension with the dominant political culture. The Warren Court was historically significant not just for what it did, which was substantial, but for reaffirming that the Justices could help to shape public policy and that their role in doing so was appropriate and constitutionally defensible, even if it was not popular. At the same time, the approach to judging adopted by the majority of the Justices did break historically from the pretense that judges merely judge and the associated idea that law is an autonomous profession. The Warren Court disrupted the prevailing consensus that the goals of law were to train professionals in analytical reasoning to be applied in narrow ways to appellate opinions. The Court, according to the older view, was important not because it made policy but because it imposed certain institutional and doctrinal restraints on the political branches through precedent and a close reading of the Constitution. The Warren Court Justices had another goal. They were willing to turn to extra-legal materials, as was the case in footnote eleven of Brown, and willing to usher in, according to G. Edward White, the first stirring of the "law and" movement. 86 The High Court became a place where practical politics, social scientific learning, and morality were viewed as more comfortably fused in Supreme Court decisions than ever before.

What the Warren Court did was to reintroduce political culture into mainstream constitutional discourse, something that had not been present so significantly since the debate over slavery in the Taney Court of the mid-nineteenth century. Since the Warren Court, it has been impossible to separate social domination from political domination in matters of constitutional debate.<sup>87</sup> Warren and his colleagues brought a pragmatic focus to American constitutional law, one that has surely altered it for years to come.

With the retirement of Warren an era certainly did come to an end, in large measure because the Chief Justice, in his unassuming but persistent ways, had managed to become the symbol of it. Much like the period following the death of John Marshall, an era of unprecedented general judicial assertion of power came to an end. That is not to say, of course, that the jurisprudence of the Warren era ended, which is an entirely different matter. Chief Justice Warren Burger was, in this regard, something of a disappointment to those conservatives who expected a sharp turn to the jurisprudential right. The Warren Court holdovers, most notably Douglas, Brennan, and Marshall, were usually able to get

<sup>86.</sup> White, *supra* note 21, at 49.

<sup>87.</sup> Morton J. Horwitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 U. CHI. L. REV. 450, 455 (1988).

the fourth, fifth, and often sixth vote to maintain and, in some instances, actually expand liberal decisions of the Warren era.

We should in all matters of historical interpretation respect the obvious at the same time we doubt it. To borrow a phrase from the current student vernacular, all of the "heavy lifting" was done in the Warren era. One of the Warren Court's most important achievements was the acknowledgement of concrete human realities and the qualities of empathy, compassion, and justice as central to constitutional decision making. That was new in the American constitutional tradition. The legacy of the Warren Court, therefore, was not simply in the case law that it propounded, some of which has been narrowed although none of it abandoned, but in the general approach that it took toward judging, the judicial process, and the role of the Court in opening to many new groups the promise of American life.

Like sharks, scholars have no choice but to move forward. Hegel was right; there is a scholarly dialectic. But in pursuing that dialectic, we should at least honor the past on its own terms. If we do so, then we will appreciate that the Warren Court, when placed in historical perspective, is and will continue to be, the ghost present at the constitutional banquet served each year beginning on the first Monday in October.

# WHY THE NUISANCE KNOT CAN'T UNDO THE TAKINGS MUDDLE

#### LOUISE A. HALPER\*

#### Introduction

In this paper, I examine the Supreme Court's 1992 decision on takings in *Lucas v. South Carolina Coastal Council* and argue, *inter alia*, that the majority's historical use of nuisance law as a tool to resolve the takings muddle is incoherent. That is not because nuisance law is itself necessarily confused, as the dissent argues.<sup>2</sup> Rather it is because the majority reads the legislature out of nuisance law, although it has historically played a role there—a role relevant to the takings inquiry. I use nineteenth-century nuisance cases from South Carolina, where *Lucas* originated, to demonstrate that this omission violates the historical record.

In *Lucas*, the Supreme Court said the legislature cannot be relied upon when it claims that the purpose of a statute is to prevent harm to the public, rather than obtain a free public benefit.<sup>3</sup> According to Justice Scalia, the opinion's author, the legislature is always subject to the temptation to obtain a benefit for the public at the expense of private property, claiming that the purpose of the statute is to prevent harm.<sup>4</sup> Hence its bona fides are always questionable and declared legislative purpose unreliable.<sup>5</sup>

Is Lucas then no more than another go-round on the Lochnerian<sup>6</sup> carousel, a sign that Justice Scalia seeks to restore judicial oversight of legislation that places limitations on profit-seeking enterprise? That is how the case is read by Justice Blackmun, who asks in dissent why the majority assumes courts can do what the legislature cannot.<sup>7</sup> This is a good question, but one to which Justice Scalia has an answer. He is too clever to fall for Lochner without a safety net: he does a backflip from its deathgrip, lands briefly in the enemy territory of the crits, then springs home into the arms of formalism, with a little boost from fellow acrobat, Richard Epstein.

To ground this aerial metaphor, let me say straight out that Justice Scalia's answer is that the judiciary need not, as it did in the period of substantive due process, develop rules distinct from legislative findings or statements of purpose, to distinguish what burdens the public interest from what benefits it in respect to land-use controls. His claim

<sup>\*</sup> Assistant Professor of Law, Washington & Lee University School of Law. First, my apologies to Carol Rose for having appropriated a piece of her useful metaphor for my title. Carol M. Rose, Mahon Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. CAL. L. Rev. 561 (1984). Thanks to my colleagues David Caudill, Gwen Handelman and Doug Rendleman for their comments on an earlier draft and to the Frances Lewis Law Center for its financial support. I am particularly grateful to Tom Yoder, W&L '95, for his very able and patient research assistance. Thanks also to my students in the Fall 1993 takings seminar at W&L; this piece is dedicated to the memory of one of them, Jack Litz.

<sup>1. 112</sup> S. Ct. 2886 (1992).

<sup>2.</sup> Id. at 2914 (Blackmun, J., dissenting) ("[O]ne searches in vain . . . for anything resembling a principle in the law of nuisance.").

<sup>3.</sup> Id. at 2899.

<sup>4.</sup> Id. at 2894-95.

<sup>5.</sup> Id. at 2898 n.12.

<sup>6.</sup> Lochner v. New York, 198 U.S. 45 (1905).

<sup>7.</sup> Lucas, 112 S. Ct. at 2913.

is a larger one, a meta-challenge to the Lochnerian dilemma: he says there is no public interest, merely a congeries of many private interests. Thus, he says, the common law regulating land use among private landowners is an appropriate and sufficient measure of the constitutionality of public land-use legislation.

Eliminating the public interest as a qualitatively distinct legal entity, Scalia can avoid the pitfalls of Lochnerism by adhering to the common law, which Justice Scalia identifies with private law. Yet it is my claim that his recourse to the common law is possible only by a determined evasion of the history of the common law as it applied to land use. In turning to the common law of private nuisance, Justice Scalia ignores the historical role of legislatures in nuisance decision-making, and thus distorts the common law, despite his attempt to find solid footing in its history. Scalia does this, it appears to me, through a construction of the common law attributable to Richard Epstein, though the latter is neither cited in the opinion nor acknowledged as its intellectual godfather.

I begin with a discussion of the majority opinion in *Lucas*, and its peculiar mix of formalism, modernism and post-modernism. In the second part of the Article, I then examine its view of nuisance, which I claim is shaped by aversion to the opposing poles of Lochnerism and deference to legislative decision-making. I make the claim that the roots of this view lay in the thinking of Epstein, as well as Ronald Coase, uneasy bedfellows whom the opinion does not manage to soothe; I point out the deficiencies in both those accounts and thus in the majority's. In the third section, I also question the adequacy of the opinion's claim to foundation in history and precedent. I examine the appropriateness of the majority's use of the *Restatement (Second) of Torts* as a guide to takings law. I examine some common law nuisance precedents of South Carolina and demonstrate how they differ from the account of private nuisance given by the majority. In addition, I look at whether the majority's claim of a historic compact locating land-use decision-making in the judiciary holds up in South Carolina precedent. Finally, I conclude that the *Lucas* opinion, while claiming the authority of history, is not in fact true to the common law doctrine that ostensibly bottoms its holding.

## I. LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

### A. The Opinion

In Lucas, the Supreme Court attempted yet again to bring some order to the "muddle" of regulatory takings.<sup>8</sup> Seventy years before, the Court, led by Justice Holmes, had for the first time held that a regulation which left an owner its land, but at a much-diminished value, could "be recognized as a taking" if the loss of value went "too far." In the next seven decades, the Court had never found a taking in any land-use regulation unaccompanied by physical invasion. In Lucas, it did.

I begin by briefly describing the *Lucas* facts and holdings. In 1986, real estate developer David Lucas paid almost a million dollars for two non-contiguous oceanfront lots on the Isle of Palms, near Charleston, South Carolina. At the time of purchase, both lots were zoned for single-family residential construction. After Lucas' purchase, but before he undertook construction, the South Carolina legislature passed the Beachfront

<sup>8.</sup> See Rose, supra note \*.

<sup>9.</sup> Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

Management Act of 1988 (BMA), which directed the state agency responsible for coastal zone management, the Coastal Council, to enforce new baselines regulating coastal construction.<sup>10</sup> The new regulations barred construction seaward of the baselines;<sup>11</sup> Lucas's lots were stranded between the new lines and the sea. Lucas could now build no occupiable structure on those lots.<sup>12</sup>

Lucas sued, alleging that the BMA worked a permanent and total taking of the value of the lots without just compensation. At trial, he prevailed; the court found a permanent, total taking of private property without just compensation in contravention of the Fifth Amendment of the Constitution of the United States.<sup>13</sup> The Coastal Council appealed. On appeal, the Supreme Court of South Carolina reversed, holding that the BMA was passed to prevent serious public harm consequent on beachfront erosion, a point Lucas conceded; thus, under the nuisance exception to the Fifth Amendment, the BMA worked a permissible restriction of Lucas' use of the property, despite its elimination of the lots' entire value.<sup>14</sup> Accordingly, there was no "regulatory taking" entitling Lucas to compensation. Lucas appealed this ruling to the United States Supreme Court, and the Court granted certiorari.<sup>15</sup>

Agreeing with the plaintiff and the trial court, the Supreme Court finally found another regulation that went "too far," in that it took from plaintiff all the value of his land, though leaving him both land and title. In an opinion written by Justice Scalia, the Court ruled that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." The Court remanded this inquiry to the court below, to give the Coastal Council an opportunity to identify "background principles of nuisance and property law" underlying the BMA that might justify restraining Lucas from building houses on his land. On remand, the South Carolina Supreme Court held that no "common law basis exists by which [the Coastal Council] could restrain Lucas's desired use of his land."

While the findings of the lower court regarding total loss of value are unlikely to recur, 19 the more problematic element of the decision is how it dealt with what has been

<sup>10. 1988</sup> Beachfront Management Act (BMA), S.C. CODE ANN. §§ 48-39-10, 48-39-280(C) (Law. Coop 1987 & Supp. 1993).

<sup>11.</sup> Id. § 48-39-290.

<sup>12.</sup> Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2890 (1992).

<sup>13. &</sup>quot;[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

<sup>14.</sup> Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991).

<sup>15.</sup> Lucas v. South Carolina Coastal Council, 112 S. Ct. 436 (1991).

<sup>16.</sup> Lucas, 112 S. Ct. at 2899.

<sup>17.</sup> Id. at 2901-02.

<sup>18.</sup> Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).

<sup>19.</sup> As a commentator points out, legislators "will be able to circumvent easily the constraints enunciated in *Lucas*. When imposing severe restrictions on land use, they will simply enumerate the activities in which the affected owners are still permitted to engage." William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1409 (1993).

known as the "nuisance exception" to takings law. Until *Lucas*, it had been thought that some regulations, though they might indeed deprive a landowner of all viable use of real property, were nonetheless immune to Fifth Amendment challenge because promulgated pursuant to the state's police power. That power is the state's to protect public health and safety by abating or preventing a noxious use amounting to a public nuisance.

The *Lucas* opinion eliminated that rationale for the "nuisance exception" where its application takes all value, holding that it is not possible to give a defensible or generalizable account of the difference between, on the one hand, a regulation that seeks to prevent harm to the public and whose effect on value is noncompensable, and a regulation that seeks a public benefit and requires eminent domain compensation, on the other. While regulation may take *some* value where a legitimate state interest (including the interest in protecting the public from harm) is advanced, "noxious use," or harm-prevention analysis cannot, on account of its indeterminacy, create an exception to the categorical rule that "total regulatory takings must be compensated." Some value may be taken from a landowner on the basis of non-operationalizable evaluations like harm prevention, but not all.

Regulation that bars a *particular* use of real property does not implicate this categorical rule for it does not work a complete loss of value. Landowners expect such regulation, "which has traditionally been guided by the understandings of our citizens." That is, given the bundle of rights that make up ownership, landowners have traditionally understood that they will occasionally be called upon to give up a stick or two. And, in terms of personal property, given "the State's traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless." But there is traditionally no such realization with respect to real property, nor is there any "implied limitation" on land ownership that would allow the state to eliminate all its value.

As the majority recognizes, the problem with the formulation that total regulatory takings must be compensated is that it is not supported by precedent.<sup>25</sup> There is indeed a very long history of halting uses without compensation, even if they are the only profitable uses of land, when the legislature judges such use poses a threat of harm to the public health or safety.<sup>26</sup> But that, says the majority, is a tradition of a different color. It concedes there are cases in which even a total loss of value will not be compensated<sup>27</sup> and

- 21. Lucas, 112 S. Ct. at 2899.
- 22. *Id*.
- 23. Id.
- 24. Id. (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
- 25. Id. at 2900 n.15.

<sup>20.</sup> Lucas, 112 S. Ct. at 2899. Here the majority echoes Professor Frank Michelman who, in an influential article, argued that the distinction between benefit and burden in land use was indeterminate. Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1196-1201 (1967).

<sup>26.</sup> See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887).

<sup>27.</sup> Although Justice Scalia seeks to distinguish away those cases in which profitable use has been lost, claiming that *some* profitable use remained to the owners in those cases, the distinction is unconvincing. *Lucas*,

gives the example of the nuclear power plant built on an earthquake fault.<sup>28</sup> That use may be halted without compensation even if it is the only use to which the land can be put and its owner thereby suffers a total extinction of its value. But such cases are *not* based on the public interest, whether harm-preventing or benefit-conferring. Rather what is now statutorily barred was in fact never permissible: "[T]he proscribed use interests were not part of [the owner's] title to begin with,"<sup>29</sup> so the bar on the use, even if the loss of value is total, takes nothing from the owner that she legitimately possessed. The landowner never possessed the right to endanger her neighbor's property by siting a dangerous use on an earthquake fault and the bar against her act takes nothing she had.

So when regulation deprives land of all value, it may do so without compensation only if the barred use is one that would be forbidden as between neighbors, without reference to larger concerns, like public harm or benefit. Any total loss of value is a taking, unless the lost value is attributable to a use that was not an inherent part of the plaintiff's property rights. Says the majority, "Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."<sup>30</sup>

The state's power to abate threats to public health and safety is "complementary" to, and apparently derived from, private landowners' power to enjoin, or get court-ordered damages due to, the depredations of a harmful neighboring use. There can be no nuisance abatement on behalf of public interests any broader than the interests of abutters. Where private parties can restrain each other's uses, the state may do so; where private parties can extinguish each other's uses only by purchase, the state too must expend funds if it wishes to put an end to a use. A public nuisance is simply a private nuisance writ

- 28. Lucas, 112 S. Ct. at 2900.
- 29. Id. at 2899.
- 30. Id. at 2900.
- 31. *Id*.

The alternative theory is that the rights of property include profitable use, even competitive injury, but not at the expense of the public. This is problematic too, for it destabilizes the proposition, central to the reasoning of the *Lucas* opinion, that the guide to the acceptability of injury to property is located in private rights, *i.e.*, in the common law of private nuisance, rather than in public rights and public nuisance. *See infra* text accompanying notes 91-106.

<sup>112</sup> S. Ct. at 2899 n.13. It rests upon the trial court's finding, unreviewed by the appellate court, *id.* at 2908 n.6 (Blackmun, J., dissenting), that Lucas, who still owned the beachfront properties, retaining the right to exclude and dispose, retained no value whatsoever, following the revision of baselines for construction. That finding was recently disproved when a neighbor offered \$350,000 for one of the lots in order to preserve his view. State's Plan to Sell Lots Criticized, COLUMBIA STATE-RECORD, Sept. 1, 1993, Metro-Region Section, at 4B.

<sup>32.</sup> It is difficult to tell on what theoretical grounds the supposed bar on injury to a neighbor rests. It cannot be that the lost value is dependent upon a use that is dangerous to others and no owner is entitled to such value. If the rights of property include profitable use but not at the expense of others, we would not allow owners to compete, since competition is precisely the process of injuring others. But, of course, injuries from competition are privileged in our legal system. See generally Oliver Wendell Holmes, Jr., Privilege, Malice, and Intent, 8 HARV. L. REV. 1 (1894).

large. In effect, the formal line between police power nuisance abatement and eminent domain is erased and both are collapsed into the equivalent of the private landowner's response to a neighbor's offending use.<sup>33</sup>

## B. Formalism, Modernism, Post-Modernism

Lucas seems an example of an attempt general in the Reagan-Bush era to resuscitate the nineteenth-century formalist proposition that law and the legal system may be derived entirely from the principles of private law.<sup>34</sup> This is the recognizable negative of the realist project a half-century before to show that private law was in fact public law. The opinion is representative of this Court's odd admixture of realism and formalism.<sup>35</sup> It takes the police power and nuisance seriously as bounded, discrete and stable entities. It purports to create a bright line test, derived from formal categories, in reaction to the contingent, particularist adhocery of previous realist-derived tests of regulatory takings.<sup>36</sup> But the opinion rests quite fundamentally on the ur-realist conclusion that it is impossible to draw a coherent line between obtaining a benefit and avoiding a burden.

Here a modernist, even a post-modernist,<sup>37</sup> move provides the basis for a retreat to formalism. There was a traditional formal distinction, perhaps not a bright line, but nonetheless discernable, between the state's uncompensable exercise of its police power to prevent harm and its compensable taking of property for a desirable public use. But, says Scalia in his realist mode, there is no coherent distinction in public law between state action to prevent public harm, such action requiring no compensation, and state action to secure a public benefit by taking private property, such action requiring compensation. What looks like the prevention of harm to a member of the public may look like the

<sup>33.</sup> This reverses the mid-nineteenth century process by which the police power emerged conceptually from the notion of eminent domain. "The eminent domain doctrine . . . implied a 'public use' of private enterprises that in turn implied the vulnerability of those enterprises to state regulation under the police powers. The concept of police power entered American jurisprudence during the years coincident with [articulation of eminent domain doctrine]." G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 59 (1988).

<sup>34.</sup> For discussion of the formalist proposition, see generally MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 9-31 (1992) [hereinafter TRANSFORMATION II].

<sup>35.</sup> There is no better example of that mix than the *Lucas* conclusion: takings cases should be decided by traditional principles, but actual historical cases are "out of accord with *any* plausible interpretation" of the Takings Clause. *Lucas*, 112 S. Ct. at 2900 n.15 (emphasis in original). Moreover, those cases lack weight because they precede the incorporation of the Takings Clause in 1897. *Id.* This disposes not only of state cases but also a great many Supreme Court cases, with differing outcomes, examining regulation and the police power, *e.g.*, Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890) (holding that an unreviewable rate regulation was a taking); Munn v. Illinois, 94 U.S. 113 (1877) (holding that rate regulation was not a taking).

<sup>36.</sup> See, e.g., Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

<sup>37.</sup> For example, Justice Scalia dismisses Justice Stevens' well-founded objection to the logic of a particular line of reasoning in the majority opinion, *Lucas*, 112 S. Ct. at 2919 (Stevens, J., dissenting), with a kind of deconstructionist recognition of the fruitlessness of seeking coherence in legal reasoning. *Id.* at 2895 n.8 ("[T]akings law is full of these all-or-nothing situations.").

securing of a benefit to the affected landowner; there is no easy way to tell who is "right." <sup>38</sup>

By eliminating the possibility of a coherent "noxious use" exception to the "categorical rule"that a total taking must be compensated, Scalia can conclude, categorically and unexceptionably, that government regulation cannot work a total deprivation of the value of real property. There is no "nuisance exception" to the categorical Fifth Amendment rule forbidding extinction of use without compensation; rather, there is an entirely different rule, another entity, itself categorical and untainted by exception, forbidding harmful land use. That category sorts the acceptable uses of property from the unacceptable and allows—indeed, requires—the statutory extinction of the unacceptable use even if that causes a total deprivation of value. "The use of these properties for what are now expressly prohibited purposes was always unlawful, and . . . it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."39 There was never a right to engage in an unacceptable use and therefore, when that use is barred, no property right is lost. By multiplying entities, that is, by separating from the bar on takings a separate, ostensibly distinct rule delineating acceptable land use, the majority has managed to retain the purity of its categories. The law of takings is stabilized by eliminating its unstable components and transferring them to another category.

Scalia's is a neat, a very neat, solution, at least at first glance.<sup>40</sup> But the means the majority chooses to operationalize this solution are not quite so neat: the distinctly separate category into which the majority intends to place the non-compensable total deprivation of value is nuisance, a doctrine "intractable to definition" and variously described by its own expounders as a mongrel,<sup>42</sup> a mystery,<sup>43</sup> a garbage can,<sup>44</sup> a

<sup>38.</sup> Of course, the initial assumption of realists offering such an indeterminacy critique was that, were the justification for a legislative determination ambiguous, the appropriate judicial response would be deference to the majoritarian judgment. *See, e.g.*, Commonwealth v. Perry, 28 N.E. 1126 (Mass. 1891) (Holmes, J., dissenting).

<sup>39.</sup> Lucas, 112 S. Ct. at 2901 (emphasis added). To return to the post-modernism of the opinion, it is hard to resist pointing out this sentence's no-doubt accidental echo of the Derridean "dangerous supplement," the repressed opposition that is, as Derrideans are wont to say, "always already" embedded at the inception of presence and that undermines the purity of every category. See, e.g., JACQUES DERRIDA, Plato's Pharmacy, in DISSEMINATION 61, 109 (Barbara Johnson trans., 1981) ("[The] dangerous supplement . . . breaks into the very thing that would have liked to do without it.").

In this case, I would argue, what Justice Scalia's heroic categorizations of presence attempt to suppress is the role of the public interest in defining land use, but it is "always already" present within the category. As Jonathan Culler, an interpreter of Derrida, says, it is precisely the characteristics of the dangerous supplement that are the "defining qualities of the central object of consideration." ON DECONSTRUCTION 168 (1982). There is a separate article to be written deconstructing *Lucas* and this is the last the reader will see of deconstruction in this one.

<sup>40.</sup> A clever commentator calls it "legerdemain." Bruce W. Burton, Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation, 72 OR. L. REV. 603, 642 (1993).

<sup>41.</sup> F.H. Newark, The Boundaries of Nuisance, 65 L.Q. REV. 480, 480 (1949).

<sup>42.</sup> Id.

<sup>43.</sup> Warren A. Seavey, Nuisance: Contributory Negligence and Other Mysteries, 65 HARV. L. REV.

quagmire, 45 and an impenetrable jungle. 46 It seems improbable that nuisance law, characterized, says Dean Prosser, by "vagueness, uncertainty and confusion," 47 can bring clarity to the "muddle" of takings law, can sort the uses inherent in the title to real property, hence categorically acceptable, from those extrinsic to title, hence categorically barred. It is my claim that, while nuisance doctrine is not, in fact, as incoherent as this litany might suggest, it is at least two-fold; that is, it includes both private and public nuisance. But, in *Lucas*, the majority ignores the latter. The task that Justice Scalia assigns to private nuisance doctrine, guidance as to the constitutionality of legislative control of land use, is not within its sphere. In effect, he has constitutionalized the wrong bit of doctrine.

## II. THE NUISANCE KNOT

#### A. In Lucas

The *Lucas* account of the place of nuisance law in judicial review of legislative decision-making implicitly goes like this: If Bob, a landowner, could obtain injunctive relief to end his neighbor Alice's use, then the legislature, too, can halt Alice's use. If a court would not enjoin Alice, and thus Bob would have to purchase Alice's use to put an end to it, then the legislature must also buy out Alice if it wishes to end her use. The legislature can order Alice to abate what a court would, on Bob's prayer for relief, order Alice to abate; the legislature must pay for what Bob must buy. Unlike Bob who must pay Alice's price, the legislature can force a sale at market price through its power of eminent domain. Nonetheless, Alice has no duty to the public different in kind from her obligations to her neighbor Bob, and the legislature has no power in respect to Alice's use greater than Bob's. The legislature cannot, without offering compensation, end Alice's use if the common law would not allow the same to Bob. Noncompensable elimination of value by legislative act is valid only when a statute codifies the common law bar against the valuable use; the state can, for example, legislate to bar the construction of a nuclear power plant on an earthquake fault because the common law would bar it.<sup>48</sup>

Thus, at least where a bar on use is total, the power to define what is acceptable land use, in effect, to regulate competition among land uses, is in the judiciary, subject only to the limitation that its decisions appear correct by "objectively reasonable application of relevant precedents." Land use regulation is not to be seen as addressing the well-being of the public, but rather choosing between incompatible, in effect, competing, uses.

<sup>984, 984 (1952).</sup> 

<sup>44.</sup> William L. Prosser, Nuisance Without Fault, 20 Tex. L. Rev. 399, 410 (1942).

<sup>45.</sup> John E. Bryson & Angus MacBeth, Public Nuisance, the Restatement (Second) of Torts, and Environmental Law, 2 ECOLOGY L.Q. 241, 241 (1972).

<sup>46.</sup> WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS §71, at 550 (1941).

<sup>47.</sup> Id.

<sup>48.</sup> Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992).

<sup>49.</sup> *Id.* at 2902 n.18 (emphasis in original). It is not clear why application of precedent may be subjected to a test of "objective reasonableness," when uses may not be subjected to a test of "objective noxiousness." Presumably, the reasonableness of judicial action is more accessible to observation than that of legislatures.

That choice is the province of the law of private nuisance;<sup>50</sup> regulating the competition between private uses is a traditional task of the judiciary (though one much curtailed since the advent of zoning some seventy years ago). Where incompatible uses of private property exist side-by-side, it has been the role of common-law courts to sort out which neighbor is to prevail.

Contrary to Justice Blackmun's claim in his dissent,<sup>51</sup> this account does not fall into the Lochnerian trap of shifting to the judiciary the assessment of whether a measure provides public benefit or prevents public harm; that is, whether it should be viewed as a compensable exercise of eminent domain or an uncompensable exercise of the police power. Rather, the majority marks out a new path, eliminating the police power from the legislature's land-use repertoire, at least where the consequence is the total extinction of the value of some piece of real property. Judicial inquiry into legislative acts will not examine ends; instead, the court is to inquire into an act's congruence with common law rules regulating the land use of neighbors.

The majority does not weaken legislative authority by subserving it to the judiciary—that was discredited by *Lochner*. Instead, it strips the legislature of the police power, an attribute of sovereignty, <sup>52</sup> by claiming that the public interest which the police power doctrinally protects does not exist as a formal entity. By giving the judiciary the power to adjudicate between legislature and landowner, *Lucas* reduces the police power to no more than the extension to the commons of the rule of *sic utere*. <sup>53</sup> The legislature's role in land use is limited to codifying the common law of private disputes. <sup>54</sup>

Although the opinion does not revive *Lochner*, it does have another flaw, a serious one considering its claim to be bottomed in common-law doctrine: as between legislature and landowner, what Justice Scalia calls the "background principles of nuisance and property law"<sup>55</sup> have traditionally allowed the legislature to choose between uses, according some privilege and disabling others, all in the name of the public interest. <sup>56</sup> Those background principles do not provide formal support for allowing the judiciary to

<sup>50.</sup> Joel Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403, 406 (1974) ("Nuisance is the common law of competing land use.").

<sup>51.</sup> Lucas, 112 S. Ct. at 2914.

<sup>52.</sup> A typical statement of the police power is from the New York Court of Appeals: "[T]he police power is the least limitable of the powers of government and . . . extends to all the great public needs." People v. Nebbia, 186 N.E. 694, 699 (N.Y. 1933), aff'd, 291 U.S. 502 (1934).

<sup>53.</sup> Sic utere two ut alienum non laedas (So use your own property as not to harm another's). BLACK'S LAW DICTIONARY 1380 (6th ed. 1990). I have previously given an account of a similar and unsuccessful attempt by a conservative treatise writer of the last century to trace the police power to the rule of sic utere. Louise A. Halper, Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age, 51 OHIO ST. L.J. 1349, 1361-63 (1990).

<sup>54.</sup> John Humbach notes that Justice Scalia, the author of *Lucas*, on the same day declared disapprovingly in Planned Parenthood v. Casey, that the "Imperial Judiciary lives." *See* 112 S. Ct. 2791, 2828 (1992) (Scalia, J., dissenting). "Alas," says Humbach, "Justice Scalia's remarks were not in *Lucas*." "Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments, 42 CATH. L. REV. 771, 772 (1993).

<sup>55.</sup> Lucas, 112 S. Ct. at 2901.

<sup>56.</sup> See infra text accompanying notes 102-21.

treat the interaction between legislature and landowner as a competition whose winner the courts determine.<sup>57</sup> The weight of common-law precedent, even in South Carolina where the *Lucas* dispute arose,<sup>58</sup> does not rest with the conclusion that the legislature has no role in land use disputes, or that the police power the legislature wields is the equivalent of judicial power to resolve private disputes. Rather the legislature has historically wielded the police power to choose between private uses on the basis of its judgment of their respective contributions to the public interest.

# B. In Epstein

I believe that the conclusion the *Lucas* majority reaches that it is possible, using private law, to provide a non-Lochnerian means to limit the legislative role in land use, is attributable to the thinking of Richard Epstein. Indeed, the disappearance of the public interest as an independent entity was urged in his brief *amicus curiae* filed in *Lucas* by the Institute for Justice. <sup>59</sup> In that brief, a condensation of positions set forth at greater length in an earlier book and several articles, Epstein argued that the common law doctrine regulating the interaction of private landowners, *i.e.*, private nuisance, is expressive of the extent to which the Fifth Amendment will allow state action to limit property uses without compensation. What follows is a summary of the Epstein argument and a critique of its coherence.

Epstein's conclusion that the Fifth Amendment mirrors private law is in accord with his general "corrective justice" model. The model posits that dealings among individuals are the correct basis to judge dealings among institutions, both public and private. An apparent corollary is that the state should act only to accomplish those limited ends that individuals cannot—for reasons of hold-out, free riding and high transaction costs—accomplish for themselves through the medium of the market. Only market failure justifies state action; nothing good is to be accomplished by the government acting to do what the market can. This is the meaning of the Fifth Amendment's limitation of forced transfers to those with public purpose. Anything else is a taking and should be prohibited even if compensated.

Reading the Fifth Amendment in this way effectuates the intention of the Framers for it protects the polity against the danger of Leviathan, of majoritarian redistribution:

Any broader conception of the police power allows the state, as agent of its citizens, to take without compensation property that the citizens themselves would have to purchase from the landowner.... [T]he same individuals who

<sup>57.</sup> See, e.g., People v. Lim, 118 P.2d 472, 476 (Cal. 1941).

<sup>58.</sup> See infra subpart III.B.

<sup>59.</sup> Richard A. Epstein, Ruminations on Lucas v. South Carolina Coastal Council: An Introduction to Amicus Curiae Brief, 25 LOY. L.A. L. REV. 1225 (1992) [hereinafter Brief].

<sup>60.</sup> Richard A. Epstein, *The Principles of Environmental Protection: The Case of Superfund*, 2 CATO J. 9, 11 (1982) [hereinafter Superfund].

<sup>61.</sup> RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 164-65 (1985) [hereinafter TAKINGS].

in their private capacity are required to purchase [an] interest in land are [not] in their public capacity allowed to take it by majority vote for nothing.<sup>62</sup>

Epstein's police power is the aggregate sum of the powers of individual citizens to respond to wrongful acts.<sup>63</sup> Where "harm threatens a large portion of the population, the state has the sum of the individual rights."<sup>64</sup> One neighbor can usually bar injury or threat of injury by another; the police power is derived from that ability and bounded by it. "Private parties can enjoin a nuisance without compensation; the state as their representative has the same power."<sup>65</sup> The whole is the police power, the parts are individual rights. "The police power as a ground for legitimate public intervention is, then, exactly the same as when a private party acts on its own behalf."<sup>66</sup>

Individual rights are aggregated into the police power because otherwise there would be too many small cases. Hence, the difference between the private action on behalf of a single landowner and state action on behalf of the public is merely quantitative. The public interest is just a large-number case of the principles governing private interests.<sup>67</sup> "Large cases simply decompose into smaller ones."<sup>68</sup> The state's "only unique power is to force exchanges upon provision of just compensation."<sup>69</sup>

- 62. Brief, supra note 59, at 1239-42. Epstein's justification of this reading is both normative and circular: "The police power cannot be interpreted as an unrestricted grant of state power to act in the public interest, for then the exception will overwhelm the [Takings] clause." TAKINGS, supra note 61, at 109. It is right that it is thus, for otherwise it would be other.
- 63. For Epstein, the police power is not what government begins with, but what is left over: it is described as "those grants of power to the federal and state government that survive the explicit limitations found in the Constitution." TAKINGS, supra note 61, at 107.

But of course the Constitution makes no grants to state government; rather, it grants to the federal government powers that are delegated by the states. Any power in the states exists prior to constitutional grant, and any police power possessed by the federal government is taken from the states and thus existed prior to the Constitution. Indeed, the earliest conceptualizations of the police power stress its pre-constitutional existence. See, e.g., Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-85 (1851) (Shaw, J.). To the extent that formal doctrinal discourse conceives of the police power as arising from grant, it is not from constitutional grant, but from an even earlier pre-constitutional Lockean compact to be governed.

This is a difficult point for Epstein to concede because it gives state power historic pre-eminence over its limitation. Hence, he does not concede: rather than acknowledge its extra-constitutional origin, Epstein wiggles it into the Constitution by implication, calling the police power "a universal part of constitutional discourse that qualifies the explicit text." TAKINGS, supra note 61, at 107.

- 64. TAKINGS, supra note 61, at 111.
- 65. Brief, supra note 59, at 1248.
- 66. TAKINGS, supra note 61, at 111.
- 67. "[T]he question of large numbers is vital only where there are actual or threatened violations of individual rights, whether or not defined as rights in the person or in private property." Superfund, supra note 60, at 16.
- 68. Superfund, supra note 60, at 17. Thus, when Epstein urges the proposition that, in respect to land use, state action under the police power is limited "to the prevention of actions that amount to the commission of a nuisance," he means, of course, a private nuisance. Brief, supra note 59, at 1228.
  - 69. TAKINGS, supra note 61, at 218.

The outlines of the majority opinion in *Lucas* take shape in Epstein's call for "a specific examination of private liability rules and government regulation as direct substitutes for each other." Police power actions, like environmental protection, should be understood as the "claims of individuals protecting person and property against the wrongful acts of other individuals." The legitimacy of state environmental regulation is based on the widespread protection it affords to private rights that can be invaded: "Air and water polution [sic] and the discharge of toxic substances all give rise to the violation of private rights, which the state is empowered to prevent."

However, Epstein's formulation does not explain what private rights open to violation by pollution the state's environmental oversight protects. This is a difficult question for Epstein, but a crucial one. It is crucial because failure to discover that there are distinctly private, as opposed to public, rights protected by the police power would mean the police power protects something other, or at the very least more, than the aggregate rights of private owners. It would mean the police power is protective of a public interest that is qualitatively distinct from private interests. Thus, he must come up with a satisfactory answer to the question of what private rights are invaded by a public nuisance, particularly given the fact that a public plaintiff may sue on a public nuisance.

A relatively easy solution is to say that the state, when it acts as public nuisance plaintiff or environmental regulator, is acting to protect its private property rights; that the state is, in other words, the owner of unowned things, like fresh air or clean water. Epstein has in fact argued that, with respect to some environmental goods, the state should be considered as being "in the position of an owner" because "a system of common law rights and remedies fails most completely in the protection of unowned things."<sup>74</sup> Hence,

- 70. Superfund, supra note 60, at 21-22.
- 71. Superfund, supra note 60, at 19.
- 72. TAKINGS, supra note 61, at 121. Epstein separates environmental regulation into two categories, one concerning "the development and exploitation of public lands," and what he calls the "very different" category "involving the rights and duties between private individuals, where the state acts only as umpire and not as owner." Superfund, supra note 60, at 9. It is into the latter category that he puts Superfund, a statute designed to obtain cleanup of hazardous waste sites. One can obviously make a strong argument, stronger than Epstein's, one would think, that Superfund is designed to protect public health and safety, rather than private individuals.
- 73. See Richard A. Posner, Epstein's Tort Theory: A Critique, 8 J. LEGAL STUD. 457, 467-68 (1979), for a critique of Epstein's discussion of private rights in unowned goods, in Richard A. Epstein, Nuisance Law: Corrective Justice and its Utilitarian Constraints, 8 J. LEGAL STUD. 49 (1979) [hereinafter Nuisance Law]. For Epstein's response to Posner's critique, see Causation and Corrective Justice: A Reply to Two Critics, 8 J. LEGAL STUD. 477, 501-02 (1979) [hereinafter Causation].
- 74. Superfund, supra note 60, at 24. If one equates "a system of common law rights and remedies" entirely and only with a set of market rules, including first capture as the root of title, then he is correct. However, I go on to argue, infra, that Epstein is wrong because the common law has always protected public rights by considering the state their guarantor, rather than their owner. Regardless of that disagreement, the important point is that the position set out in the Superfund essay is not the same as that Epstein took in respect to Lucas. If the state were considered in the position of an owner in respect to the coastal ecosystem, it seems hard to imagine that it would not have prevailed in Lucas, where the Beachfront Management Act was designed, whether to prevent harm or to obtain benefit, to preserve the coastal ecosystem.

let us assume that, for the purpose of protecting those things not yet reduced to the ownership of individuals, the state may act as its owner. This provides some solution to the "unfortunate situation [that occurs] whenever potentially valuable resources are not the subject of exclusive rights."75 The state is in the position of an owner as "representative of all individuals" in order to prevent the "premature exhaustion of the common pool."76

This formulation is, however, troublesome for Epstein: although it allows the state to prevent premature exhaustion of resources by capture, it can also ratify unnecessary regulation and hence limitation of otherwise desirable capture. After all, the state owns the resource in question and may set such rules as it wishes with respect to harvesting the resource.<sup>77</sup> For this reason, Epstein needs to avoid the proposition that the justification for state oversight of goods in the common pool is state ownership. But, on the other hand, hewing to the "hard line that finds vested rights only in [goods] captured"78 from the common pool would deny protection to the environment, or at least to that part of it, like air, water, and the ecosystem, that is not owned by individuals. The puzzle is how to protect what is not privately owned without conceding that it is publicly owned.

In Takings, Epstein posits a more sophisticated answer to this problem: environmental regulation protects neither that which is unowned nor that which is stateowned, but rather the individual's right to acquire in the future what is as yet unowned.<sup>79</sup> Each of us has those rights in the common pool. My right in the common pool is a right of acquisition that "is itself a property right, good against the world."80 And while "there is no private wrong to control when private parties take unowned things,"81 making it impossible for others to capture unowned things is either a nuisance or a taking, depending upon who is acting.<sup>82</sup> A polluter violates rights of acquisition by unregulated pollution, the government takes the same property rights by overregulating polluters.

Although this move is, for Epstein, an improvement on either of the alternative propositions—that environmental regulation protects either what is unowned or what is state-owned—it is not really a solution. Three things remain problematic. One is that the proposition that the state protects private rights of acquisition does not explain how the state can act to prevent a polluting use that does not interfere with the current exercise of those rights. The second is that Epstein's formulation requires us to assume that air, water, species diversity, wilderness, and whatever else is unowned, are indeed capable of being acquired, that is, reduced to individual possession, at some future point. The third is that it requires compensation of every existing expectation.

In considering the first problem, it may help to ask whether fisherpersons whose catch is reduced by pollution or by new regulation and law professors who never fish are in the same status in regard to a challenge to the limiting event. The answer is shrouded

<sup>75.</sup> Causation, supra note 73, at 502.

Superfund, supra note 60, at 25. 76.

<sup>77.</sup> TAKINGS, supra note 61, at 223.

<sup>78.</sup> TAKINGS, supra note 61, at 224.

<sup>79.</sup> TAKINGS, supra note 61, at 224.

<sup>80.</sup> TAKINGS, supra note 61, at 219.

<sup>81.</sup> TAKINGS, supra note 61, at 219.

<sup>82.</sup> TAKINGS, supra note 61, at 219.

in the ambiguity of what right is potentially infringed either by government regulation or by pollution. Is it a right to acquire or is it a right in goods not yet acquired? If the former, it is not clear in what respect the fisherperson differs from the rest of the world; hence, when the state sets fishing rules, either both fisherperson and professor have good claims against polluters or neither does. If neither does, the state does not either. If both do, the right to be vindicated does not rest on private ownership and we are back to the question of whether the public interest is different from individual private rights.

If, on the other hand, the right infringed by polluters is a right in those goods that fisherpersons have an expectation of acquiring, but law professors do not, the calculus of expectation divides the world into two classes. Only those in the first category have a nuisance claim in respect to the pollution. This seems workable as a means of separating legitimate claimants from those with no claim, but it does not explain the basis of the state's claim against pollution. If there are no commercial fishing enterprises and the first category is empty, is the state unable to abate pollution threatening the fish? Suppose for example that no commercial fishing enterprise exists because the population does not eat fish, but birds; and suppose as well that the birds eat fish, so there is a general interest in protecting the fish. Does the absence of a group with a commercial expectation of acquiring the fish mean that the state cannot protect the common pool of fish? Epstein does not answer this question.

The second, and related, problem is whether species diversity, for example, can be considered capable of private acquisition in the future. If it is not possible for us to conceive of individual rights in species diversity, or in anything not reduced to individual possession, Epstein's theoretical posture is in danger of decomposing because the rights that are vindicated when the state acts to protect these goods are not only not in private hands now, but never will be. There can be no private right in that which is not yet acquired, if it is impossible of acquisition at any time in the future. Epstein's move to transmogrify rights of possession into rights of acquisition is thus insufficient. What is protected by the police power may be something incapable of individual possession, a right not of possession, but of continuing non-possession, a right held by non-possessors, that is to say, by the public at large, a right that may be vindicated against any who would violate it by posssession, a right to prevent propertization, a right against property.

Finally, although Epstein's solution may divide those with no expectation from those with some expectation, it makes any and all expectation compensable. Anyone with an erased expectation, large or small, total or partial, must be compensated, leaving open the door to the concern Justice Holmes expressed in *Mahon* that compensating expectation will bring government to a halt.<sup>83</sup> This problem does not much trouble Epstein, who has suggested in commentary on *Lucas*, that the Court should simply have cut the Gordian knot.<sup>84</sup> Rather than ask what percentage of loss below 100% may be compensable, the court should protect *all* expectations of profit with respect to land, thereby taking on landuse planning, zoning and the congeries of environmental regulation that has made up the landscape of land use over the past fifty or so years. However, Justice Scalia apparently could not command a majority in *Lucas* willing to compensate all expectations. Instead,

<sup>83.</sup> Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

<sup>84.</sup> Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1388-89 (1993) [hereinafter *Tangled Web*].

the court retreated to the categorical definition that a total loss of value is a taking when that loss is not attributable to abating a private nuisance. But, as Justice Scalia admits, 85 it has no sound reason for that limitation. The logic of the opinion, as opposed to its actual holding, thus tracks Epstein's reasoning and leaves unanswered the question of where compensation ought to begin.

#### C. In Coase

Perhaps recognizing the dilemma within Epstein's theory, his inability to explain what the state protects when it either regulates or acts against public nuisance, the *Lucas* opinion does not explicitly adopt his claim that private property rights are the basis of the police power. While it adopts his outcome, in that private nuisance doctrine becomes the guide to the constitutionality of public law, the explicit reason for the turn to private nuisance is harm/benefit indeterminacy.

This reason, too, suffers from some incoherence, for harm/benefit indeterminacy also famously exists in respect to private nuisance, that is, the disputes of neighbors over land use. It is more than thirty years since Ronald Coase pointed out the absence of a coherent distinction between courts abating a nuisance on behalf of a neighbor's use and providing an unpaid benefit to that neighbor. Rather than asking a court to make unjustifiable distinctions among uses, Coase concluded that, given perfect information and no transaction costs, neighbors' disputes ought to be left to the market to assess the worth of benefits and burdens. Let the party who values her own use most highly prevail. Illogically, the problem Coase identified with judicial resolution of private disputes, that is, harm/benefit indeterminacy, is precisely the reason the majority gives for using the law of private dispute resolution to judge the constitutionality of public-regarding legislation.

Epstein has rejected the Coase theorem as "causal nihilism," claiming that it is not in fact difficult to distinguish between the creator of a nuisance and its victim. Such distinctions he believes are possible both on the private and the public level; courts can judge fairly between competing private uses and also between public burden and public benefit. But Epstein's solution to the Coasean puzzle calls for courts to look at the natural rights of property and decide whether they are invaded by the action of another, whether neighbor or state. This would be to resuscitate *Lochner*, and indeed, Epstein claims that case was not wrongly decided. But even if Epstein would welcome the revival of substantive due process in land use law, the logic of majority-making will not allow it.

<sup>85.</sup> Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 n.8 (1992).

<sup>86.</sup> Ronald Coase, The Problem of Social Cost, 3 J. L. & ECON. 1 (1960).

<sup>87.</sup> Nuisance Law, supra note 73, at 58.

<sup>88.</sup> Takings, supra note 61, at 117-19. More recently Epstein has seemed to accept Coase's notion that there is no moral basis for assigning entitlements. See Tangled Web, supra note 84, at 1388-89. Rather, we can at best "[p]ick the path which reduces the transaction costs necessary to reach the optimal allocation of resources." Tangled Web, supra note 84, at 1389.

<sup>89.</sup> TAKINGS, supra note 61, at 121-25.

<sup>90.</sup> Richard Epstein, Toward a Revitalization of the Contract Clause, 51 U. CHI. L. REV. 703, 734 (1984).

So the *Lucas* opinion takes an unprincipled course, adopting Epstein's premise that the public interest is merely private interest writ large, but rejecting the necessarily-implied Lochnerian judicial means of resolving any apparent conflict between the two. This unprincipled course is the mirror image of the majority's acceptance of the Coase principle that burdens and benefits are indistinguishable when the antagonists are government on one hand and a private landowner on the other, while rejecting the same principle when the antagonists are private landowners. In sum, then, the theoretical underpinnings of the claim that private nuisance law holds the key to assessing the rightness of legislative land use decisions is unsustainable. In the next section, I go on to claim that the historical underpinnings of that claim are equally shaky.

# III. THE ROLE OF LEGISLATURES IN NUISANCE LAW: THE SOUTH CAROLINA EXAMPLE

As I have noted, the *Lucas* opinion, while it draws heavily on Epstein, does not cite him. Instead, its citations are to treatise and history—the *Restatement of Torts*, the tradition of judicial oversight of private land use conflicts, and a special compact concerning real property allegedly embedded in the Takings Clause. I propose now to work backward through the historical support for the majority's reading of nuisance law as private law, how it is derived, and whether it is sustainable.

#### A. Nuisance Doctrine and The Restatement

The guide the *Lucas* majority recommends to courts making decisions under the rule that legislation must track the common law of private nuisance is the *Restatement* (Second) of Torts. 91 According to the majority, the inquiry a court should make in respect to a claim that legislation works a taking requires examination of

the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, . . . the social value of the claimant's activities and their suitability to the locality in question, . . . and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government . . . . The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant. 92

This mirrors the six factors of the nuisance test set out in the *Restatement*: the extent and degree of harm attributable to a use, its social value, its suitability to the locale, the relative ease with which harm can be avoided, whether the offending use was initiated by the current owner's predecessor, and whether the offending use is carried on by others elsewhere.<sup>93</sup>

<sup>91.</sup> Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992).

<sup>92.</sup> Id.

<sup>93.</sup> RESTATEMENT (SECOND) OF TORTS §§ 826-31 (1979) [hereinafter RESTATEMENT]. No single factor is dispositive and each is to be balanced against the other. Generally speaking, the factors, when balanced, tend to favor large-scale use over small-scale, and intense use over less intense. Thus, the *Restatement (Second)* test

However, the Restatement is not relevant to anything other than the conflicts of neighbors. This is not a failing in the Restatement, which is, after all, a guide to the law of torts. Historically, common law public nuisance has not been treated as part of the common law of tort or of property; indeed it found no place in either the Restatement of Property or the first Restatement of Torts. The Restatement of Property defined the law of nuisance as a branch of tort and made "no attempt at all . . . to deal with public control of land use or the law of natural resources."94 The first Restatement of Torts entirely ignored public nuisance. 95 The nuisance topic was assigned to a drafting group made up of property experts; they examined private nuisance, that is, injury to privately-owned real property, and ignored public nuisance, injury to public rights.<sup>96</sup> Although the drafters of the Restatement (Second) of Torts sought to rectify that omission, the first draft of the Restatement (Second) to deal with public nuisance defined it only in terms of criminal conduct, and thus excluded it from the range of topics relevant to the treatise's purpose.<sup>97</sup> In the final version, the public nuisance section was expanded to include the private plaintiff's tort action for particular damages due to public nuisance, but the sovereign's executive exercise of the police power in an equitable, rather than criminal, proceeding was still hors de texte.

The public plaintiff's public nuisance action is not ignored because it is simply private nuisance writ large, the *Lucas* approach. Rather, there is the beginning of a recognition that the sovereign's public nuisance action is something other than a tort case. Dean Prosser, the reporter for the *Restatement (Second)*, explained in his own treatise on torts that public nuisance was the term used for "criminal offenses, consisting of an interference with the rights of the community at large." On the other hand, he denominated private nuisance "a civil wrong, based on a disturbance of rights in land." He considered the two separate entities as having "almost nothing in common, except that each causes inconvenience to someone."

is in fact an extreme form of the balancing tests that are otherwise anathema to members of the majority in respect to takings decisions.

- 94. John Donahue, The Future of the Concept of Property Predicted from its Past, in XXII NOMOS, PROPERTY 28, 43 (1980).
- 95. See RESTATEMENT, supra note 93, §§ 822-40 (1934). See also SEAVEY, supra note 43, at 985 n.4 ("It is to be noted that there are no sections in the Restatement which consider public nuisances.").
  - 96. Bryson & MacBeth, supra note 45, at 242 n.1.
- 97. Bryson & MacBeth, *supra* note 45, at 242-43. The explanation for treating public nuisance as a criminal offense was that the violation of rights common to all did not originally give rise to a right of action in each affected party, but were to be dealt with by means of indictment as a violation of public peace and order.
- 98. See, e.g., RESTATEMENT, supra note 93, §821C cmt. j. ("[T]here may be a distinction between an individual suit for damages and a suit in behalf of the public or a class action."). See also, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §90, at 643 (5th ed. 1984) (recognizing that a torts treatise "is not the place to discuss in any detail the remedies available to the state and other governmental units to protect the general welfare from conduct regarded as so inimical to many people as to constitute a public nuisance."). This volume is, of course, the successor to Prosser's HANDBOOK, supra note 46.
  - 99. PROSSER, supra note 46, §71, at 552 (1941).
  - 100. PROSSER, *supra* note 46, §71, at 552 (1941).
  - 101. PROSSER, supra note 46, §71, at 552 (1941).

Reduction of all nuisance law to private nuisance is formally incorrect; private nuisance is a smaller category than nuisance generally, as Dean Prosser recognized. When the state abates a public nuisance, it is not in all, or perhaps not even in most, cases acting like a private landowner to protect what it owns. Rather, it acts to protect unowned resources, e.g., silence, clean air, pure water, animals ferae naturae, species diversity, wilderness, the ecosphere. As I have noted above, 102 calling this interest a right of ownership, as Epstein sometimes does, is problematic. It appears to be more doctrinally correct to say that there is a public interest in protecting what may never be owned.

The public interest is also the basis for legislative distinctions between the rights afforded property uses in respect to nuisance. Thus, historically, there was not only power in the legislature to protect the public against offensive uses by legislating against nuisances, but also a correlative power to extend immunity from nuisance liability to offending uses, when such protection was deemed in the public interest. Injury to property was originally governed by a form of strict liability: it was actionable without reference to the care taken by the defendant to avoid it. 103 When, in the early nineteenth century, the privilege to do harm was carefully extended to personal injury generally, 104 it was not extended to injury to property. In fact, nuisance retained its strict liability character well into the twentieth century. 105 Clearly, across-the-board application of such a doctrine would have greatly limited enterprise, making every large-scale use liable to its smaller neighbors for the undoubted disruptions it would cause them. legislatures granted the privilege of a negligence standard to certain uses on a case-bycase basis; uses authorized by the legislature were held to have the privilege to harm their neighbors so long as the harm was not done negligently. The doctrine of legislative authorization as the sole basis for application of a negligence standard to the injuries

<sup>102.</sup> See supra text accompanying notes 73-85 for a discussion of Epstein.

<sup>103. 3</sup> WILLIAM BLACKSTONE, COMMENTARIES \*217-18 ("[I]f one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nusance [sic]: for it is incumbent on him to find some other place to do that act, where it will be less offensive."). See, e.g., Yonkers Bd. of Health v. Copcutt, 35 N.E. 443, 445 (N.Y. 1893) ("[H]owever innocent [the owner] may be in creating the condition or maintaining it, he is bound to abate it upon the proper official request, and, if he refuses, becomes at once responsible for the existing condition, as continuing a nuisance which it was his right and his duty to remove and suppress."). See also Daniel Coquillette, Mosses from an Old Manse: Another Look at Some Historic Property Cases about the Environment, 64 CORNELL L. REV. 761, 778 (1979) (Historically, nuisance did not "involve[] questions of fault in the modern sense.").

<sup>104.</sup> There is a good deal of controversy over whether personal injury ever had the benefit of a strict liability standard in English law, with *Brown v. Kendall* marking a decided shift, or whether strict liability in tort was more apparent than real. *Compare, e.g.*, MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 89-91 (1978), and Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America:* A Reinterpretation, 90 YALE L.J. 1717, 1722-30 (1981). However, there seems no doubt that nuisance, known as trespass on the case, was historically treated like trespass in respect to strict liability.

<sup>105.</sup> It was not until 1928 that then-Judge Cardozo definitively extended negligence principles to nuisance cases: "The primary meaning [of nuisance] does not involve the element of negligence .... [W]e hold now that whenever a nuisance has its origin in negligence, one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance." McFarlane v. City of Niagara Falls, 160 N.E. 391, 391-92 (N.Y. 1928).

caused to property by another use retained its vitality until about the time that land use became bureaucratized through zoning and planning.<sup>106</sup>

# B. Courts and Legislature in South Carolina Nuisance Law

This doctrine also applied in South Carolina, where *Lucas* originated. That is to say, South Carolina courts, like the courts of other states, traditionally recognized and honored a distinction between uses authorized by the legislature that afforded the privilege to do harm to their neighbors under a standard of due care, and unauthorized uses that were subject to a strict liability standard.

A continuing theme in the South Carolina cases is that courts, though willing to adjudicate property rights of private parties, did not consider as within the judicial sphere decisions as to what kind of private land use was in the public interest. <sup>107</sup> If a use was legislatively-chartered, as virtually all large-scale enterprise was in the period before general incorporation statutes, the consequences of its proper undertaking were not actionable. Thus, where, in 1858, a Charleston cotton press had been licensed by municipal action, the court would not quickly find it a nuisance to complaining neighbors. In considering whether the cotton press belonged in the neighborhood and whether the plaintiff was unreasonably endangered, in sum, whether defendant's business was a private nuisance, the court decided that

the action of the council is, as evidence, entitled to higher estimation than the opinions of private individuals. The mayor and aldermen are the representatives of the City, and a citizen who has made an investment under their authority, after consulting them in a matter entrusted to their judgement, should not be readily found guilty of doing wrong by creating danger which they do not apprehend, or producing annoyances which they do not perceive. <sup>108</sup>

Similarly, in 1850, the court held that if an authorized use led to a decline in a neighbor's property value, the decline was not compensable. In *McLauchlin*, the legislature had approved defendant's obstruction of a public way, otherwise the classic

<sup>106.</sup> I have discussed the traditional strict liability character of nuisance, legislative extension of a negligence standard to particular uses, and subsequent judicial adoption of an overall negligence standard, at greater length in Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeals, 1850-1915*, 54 ALB. L. REV. 301 (1991). I argue that across-the-board extension of a negligence standard to all injuries done to property by other uses would have destabilized property rights; hence, the law of nuisance did not attain a coherent set of liability rules, as tort law did, but remained a jumble of contradictory principles, a doctrine "too valuable to abandon, yet too contested to rationalize." *Id.* at 303.

<sup>107.</sup> A discussion of the interaction between the post-Civil War economy of South Carolina and its judicial precedent in the area of land use is beyond the scope of this paper. Suffice it to say, however, that Southern legal regionalism does not seem to have affected nuisance law. See LAWRENCE FRIEDMAN, The Law Between the States: Some Thoughts on Southern Legal History, in Ambivalent Legacy: A Legal History OF THE SOUTH 30, 33 (Bodenhamer & Ely eds., 1984). As the cases cited infra demonstrate, South Carolina afforded assistance to large-scale infrastructural undertakings, like dams and railroads, just as northern states did.

<sup>108.</sup> Ryan v. Copes, 45 S.C.L. (11 Rich.) 217, 238 (1858).

<sup>109.</sup> McLauchlin v. Charlotte and S.C. R.R., 39 S.C.L. (5 Rich.) 583 (1850).

public nuisance. But, said the court, "[i]f the streets are ordinary highways, and their obstruction has been authorized by law, no right remains for an individual to complain, by action at law, of peculiar damage done to him by an act detrimental to the public, which public authority has sanctioned."<sup>110</sup> That the plaintiff had lost the power to develop his property in the future gave rise to no claim. So long as the owner retained the current use, an effect on developmental values did not warrant court action. "A mere temporary diminution of marketable value, whilst the property is out of market, and the owner's enjoyment of it is uninterrupted, is no actual loss, but only matter of speculation which ceases when the cause of diminution is removed."<sup>111</sup>

Without legislative authorization, the traditional strict liability character of nuisance retained its historical vitality. The character of the act creating the nuisance was irrelevant and the plea of no negligence was not a defense:

[T]o allow the owner of a tract of land to so use his own land in the prosecution of any lawful business as would necessarily or probably injure his neighbor, provided he takes all reasonable care to prevent such injury . . . we do not understand to be the law. On the contrary, we think, if one uses his own land for the prosecution of some business from which injury to his neighbor would either necessarily or probably ensue, he is liable if such injury does result, even though he may have used reasonable care in the prosecution of such business.<sup>112</sup>

Injuries to property carried the burden of strict liability, unless the legislature chose to lighten that burden. A claim of injury against defendant's authorized use could succeed only through "some allegations of facts showing that the defendant, in doing the act which it was authorized to do, has, either wantonly or through negligence, done the act in such a manner as unnecessarily impaired or injured the rights of the plaintiff." Absent defendant's negligence in operating an authorized use, the plaintiff would be considered damaged without injury. In such a case, plaintiff's nuisance claim would succeed only on a showing that the offending use was undertaken negligently. The reasoning was that the "law will not declare that to be a nuisance... which it has authorized... [but] the law does not authorize negligence."

Two dam and pond cases, cases typical of the improvements undertaken for the purposes of enterprise in low-lying South Carolina, make the point well. Where a dam and pond were authorized by the legislature, only negligence could make the owner liable for nuisance when the pond became a breeding ground for malarial mosquitoes. But authorization had to be explicit and would not be inferred from long usage. So, in another dam and pond case where defendant claimed the prescriptive right to continue the damage done by his dam's flooding, the court said:

<sup>110.</sup> Id. at 593.

<sup>111.</sup> Id. at 592.

<sup>112.</sup> Frost v. Berkeley Phosphate Co., 20 S.E. 280, 283 (S.C. 1894).

<sup>113.</sup> Wallace v. Columbia & G. R., 12 S.E. 815, 815 (S.C. 1891).

<sup>114.</sup> McLauchlin, 39 S.C.L. (5 Rich.) at 599.

<sup>115.</sup> Johnson v. Charleston & W.C. Ry., 50 S.E. 775, 776 (S.C. 1905).

<sup>116.</sup> Belton v. Wateree Power Co., 115 S.E. 587, 588-89 (S.C. 1922).

While the long possession may confer a right to the land flowed, and all the proprietary incidents which follow the title to property, it can not be set up as a bar to the abatement of a nuisance on behalf of the public. A right to violate the law is not to be presumed as allowed by the State itself, for this would be inconsistent with the very purpose for which it was created, and would involve an absurdity too violent to be entertained even for a moment.<sup>117</sup>

The legislature was free to decide not only that the public benefit of an offending use outweighed its harm to a private party, but also what land use to privilege with a grant of immunity from the strict liability standard. South Carolina courts declined to take a role in deciding what land uses were to be considered as useful to the public. They carefully distinguished between the function of the judiciary and that of the legislature, refusing to undertake to balance private harm against public utility. They viewed balancing as political, and the power to balance as the legislature's.

In a case where pollution of a stream was an issue between private litigants, a defendant, whose mining activity was obviously far more extensive than plaintiff's small farming operation, asked the court to take that fact into account in deciding whether a nuisance existed. Defendant was told that it was not for the court to consider

the question raised by the defendant as to the balance of convenience, or of advantage or disadvantage to the plaintiff and defendant and the public at large, for the defendant's use of the stream. That question would be pertinent only in an application addressed to the Legislature to give such corporations the power of condemnation.<sup>118</sup>

Similarly, in a 1909 case, the Attorney General of South Carolina claimed that the bridge a power company wanted to build over a canal would threaten navigation and sought to enjoin its construction.<sup>119</sup> The company claimed that the court should weigh the good to be done by the building of the bridge, part of a larger project to create a reservoir, against the harm done by the obstruction of the canal. The court denied it had the power to refuse an injunction on the ground that the

right of navigation of the Columbia Canal may be of small value in comparison with the great value to the city of Columbia of the obstruction it proposes to erect. The court's discretion is not broad enough to permit it to refuse to protect either private or public property or rights because the invasion of such property or the violation of such right would be of benefit to an individual or to a portion of the public.<sup>120</sup>

It was well-settled that a political decision could be made to authorize the existence of a nuisance; active uses should be encouraged. Even if such uses did some harm to their

<sup>117.</sup> State v. Rankin, 3 S.C. 438, 449 (1872). "The right to property from long possession . . . cannot be applied to sanction or uphold its use or devotion to purposes not permitted by the State, either as affecting its own sovereignty or the rights of third persons." *Id.* at 448-49.

<sup>118.</sup> Williams v. Haile Gold Mining Co., 66 S.E. 117, 118 (S.C. 1910).

<sup>119.</sup> State v. Columbia Water Power Co., 63 S.E. 884 (S.C. 1909).

<sup>120.</sup> Id. at 890.

neighbors, their contribution to economic growth justified the extension to them of a form of eminent domain allowing their depredations, so long as carefully done. But that decision was solely political and not for the courts. South Carolina courts characterized as a legislative enterprise the balancing of public good against private right in the determination of whether a use was allowable; the balancing endeavor, authorizing harm to private property for the public good, was considered outside the judicial sphere.<sup>121</sup>

# C. The "Historical Compact" in South Carolina

To sum up the state of nineteenth-century South Carolina nuisance law, what would otherwise be a nuisance could be authorized by the legislature, if it judged that the public benefit of the offending use outweighed its harm to a private party. Such a use would get the privilege of a negligence standard when a neighbor complained of harm. Sans such authorization, the harm to a neighbor, however carefully created, would not be tolerated. This doctrine, accepting a tort standard of liability for the legislatively-authorized use, but retaining strict liability for the harms done to property by the unauthorized use, is clear evidence that state courts did not believe that they alone made the law of land use. This evidence contradicts the *Lucas* claim that judicial review of land use under common law private nuisance principles and without regard to political decision-making is part of a "historical compact" between government and citizen represented in the Fifth Amendment, at least as that compact was interpreted in South Carolina.

Further traversing the *Lucas* opinion, it appears that judicial review of legislative land use decisions was part of that compact neither before the Takings Clause was nationalized nor afterwards. According to Justice Scalia, pre-1897 judicial opinions allowing legislatures to limit and even extinguish rights of real property in the public interest are "irrelevant" to an understanding of the "historical compact" regarding government interference with real property that is embodied in the Takings Clause. Those early cases were decided in a context in which the Supreme Court had not yet incorporated the Constitution's guarantee against takings and made it applicable to state action; hence, they do not reflect a "plausible" account of the compact.

But, to take only one example, the outcomes of two South Carolina nuisance cases pre- and post-1897, *McLauchlin* in 1850 and *Johnson* in 1905, were virtually identical. In each case, the court refused to grant relief to a plaintiff claiming property injury due to a neighbor's use, on the ground that the legislature's charter of the use immunized it from liability for any non-negligent injury to plaintiff's property. Neither before nor after 1897, did the court believe itself obliged to offer a plaintiff the redress that would have been available had defendant not been armed with the legislature's conclusion that its use was in the public interest. The incorporation of the Takings Clause does not seem to have

<sup>121.</sup> For a general discussion of formalist resistance to judicial use of modern balancing tests on the grounds that it involved courts in political decision-making, see TRANSFORMATION II, supra note 34, at 28.

<sup>122.</sup> Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992).

<sup>123.</sup> Id. at 2900 n.15.

<sup>124.</sup> In Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897), the Court incorporated the Fifth Amendment's guarantee against takings to govern state action.

<sup>125.</sup> Lucas, 112 S. Ct. at 2900 n.15.

affected the judicial premise that the legislature had the power to weigh the public interest in private land uses, at least not in South Carolina.

The much harder question for South Carolina courts, as for other state and federal courts, <sup>126</sup> was whether to review the legislative determination that a use could be barred as a nuisance. That decision could destroy ongoing businesses, eliminating their value entirely. South Carolina courts rejected the idea that the legislature, which could make a nuisance no nuisance by immunizing from liability its careful operation, could conversely make no nuisance a nuisance. A body "empowered by law to declare what shall constitute a nuisance, may not declare that to be [a nuisance] which in fact is not," said the South Carolina Supreme Court. <sup>127</sup> The idea at work was that the legislature could indeed bar categories of use, but singling out a particular use as a nuisance was subject to judicial review. In *Law v. City of Spartanburg*, the challenged ordinance, which appeared on its face a bar against a whole category of uses, on closer examination revealed itself as limited to barring one particular use, the only one in the city that met all the aspects of the categorical definition. A legislature could act generally in the public interest, but its work could be challenged if its effect was to single out a particular use. <sup>128</sup>

The mention of this limitation South Carolina courts recognized in respect to legislative power should make clear that I am not attempting to force closure on the nuisance/takings problem with the claim that state common law nuisance doctrine mandated strict judicial deference to legislatures. Nuisance doctrine has never provided a clearcut guide to how far a legislature could go in limiting the use of property under the rubric of the police power. And demonstrating that state judiciaries deferred to a legislative role in land-use decisions is a long way from establishing the degree of deference courts owe to legislative action limiting property use. All we can say is that historically, the "background principles of nuisance and property law" have seemed to include the notion of a police power that can both limit and expand the rights of property in the interests of the community, a police power that courts have agreed is confided to the legislature, not the judiciary.

#### CONCLUSION

Although I cannot undo the takings muddle with nuisance doctrine, neither can the *Lucas* majority. What this look at South Carolina nuisance cases reveals is the lack of precedential support for the application of private nuisance doctrine, such as that

<sup>126.</sup> See, e.g., Lawton v. Steele, 23 N.E. 878 (N.Y. 1890), aff'd, 152 U.S. 133 (1894).

<sup>127.</sup> Law v. City of Spartanburg, 146 S.E. 12, 14 (S.C. 1928).

<sup>128.</sup> Indeed, Carol Rose, an acute commentator on the takings issue, argues that in *Mahon*, Justice Holmes's stricture against legislative trespass on private rights, against regulation that "goes too far," is aimed, not at the extent of value lost, but at "singling out," and the related problem of forced wealth transfers between private individuals. Rose, *supra* note \*, at 566, 581-87.

<sup>129.</sup> Indeed, South Carolina has a state constitutional tradition, in the form of a theory of inverse condemnation, that takes a very restrictive, indeed suspicious, view of legislative line-drawing when it comes to preventing a public harm or attaining a public benefit. Bradford W. Wyche, A Guide to the Common Law of Nuisance in South Carolina, 45 S.C. L. REV. 337, 368-70 (1994).

<sup>130.</sup> Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901-02 (1992).

enunciated in the Restatement (Second) of Torts, to cases involving a legislative evaluation of harm and benefit. Precisely the same balancing inquiry enjoined on state courts by the majority's adoption of the Restatement's nuisance factors has been rejected by the courts of South Carolina as infringing upon a legislative task, the decision as to what forms of land use are in the public interest. The majority's claim of a clear, unequivocal and single-minded common-law doctrinal tradition arising out of private law and denominating the appropriate conditions of land use is revealed as historically inaccurate. To the contrary, the "background principles of nuisance and property law" in state common law are embedded in the self-same dilemma that has plagued the Supreme Court of the United States in interpreting the constitutional mandates of the Fifth Amendment—how far is too far?

Justice Scalia is determined to limit the power of legislatures to regulate property. But the practical considerations of majority-making require him to reject the Lochnerian path that would allow wholesale judicial review of legislative acts. He thus makes two moves: first, he says, the Lochnerian path is closed due to burden/benefit indeterminacy; neither legislative nor judicial pronouncements as to the nature of a legislative act are reliable. Second, he adopts Richard Epstein's position that the police power solely protects and is bounded by private power, *i.e.*, private rights. Hence, he concludes, the only means left by which to judge the constitutionality of a legislative act under the police power are the common-law precedents that have historically governed the competition between private rights.

This conclusion must fail not only because the application of private nuisance law in the public sphere is incoherent, but also because, as a matter of historical fact, the law of private nuisance is not what common-law courts have applied when land use and the public interest were at issue. Looking at the South Carolina record, it is clear that the judiciary made an explicit distinction between legislative decision-making regarding the public interest and judicial resolution of competition among private land uses. Erasing the public-private distinction and applying the law of private nuisance to the determination of public rights is an appealing alternative to *Lochner*, but it is not true to the record of history.

# ONE HUNDRED YEARS OF MODERN LEGAL THOUGHT: FROM LANGDELL AND HOLMES TO POSNER AND SCHLAG

#### GARY MINDA\*

One hundred years ago, a distinctively modern condition, what some have called "legal modernism," came to dominate and shape the visions and ideas of modern legal thought. The influence of legal modernism has been pervasive and long-lived. It is difficult to identify a single theoretical development in this century that has not exhibited the effect of the form, the logic, and the implicit beliefs of legal modernism. The form, logic, and style of legal modernism can be found in the development of mainstream legal theory as well as contemporary movements in legal thought, such as critical legal studies, law and economics, feminist legal theory, and law and literature, that have been critical of mainstream legal theory. It would seem that legal studies have never quite overcome the influence of legal modernism, though many have tried to shake free from its influence.<sup>2</sup>

What, then, is "legal modernism"? Legal modernism is an aesthetic, political, cultural and intellectual movement, or set of movements, motivated largely by the lawyer's romance, faith, and, yes, obsession with the central idea that it is possible to uncover and explain the essential truths of the world by employing the correct methodology, narrative, technique, or mindset. Legal modernism is the lawyer's Enlightenment project to perfect and render pure law's claim to foundational authority.<sup>3</sup>

- \* ©1994, Professor of Law, Brooklyn Law School. This essay develops a theme from my recent book, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END, *infra* note 1. I would like to thank James Fanto, Stephen M. Feldman, and Pierre Schlag for sharing with me their reactions to my work. The writing of this essay was supported by a summer research grant from Brooklyn Law School.
- 1. See, e.g., DAVID LUBAN, LEGAL MODERNISM (1994); David Luban, Legal Modernism, 84 MICH. L. REV. 1656 (1986); STEPHEN M. FELDMAN, From Modernism to Postmodernism in American Legal Thought: The Significance of the Warren Court, in The Warren Court: A Twenty-Five Year Retrospective (B. Schwartz ed., 1995). See also Gary Minda, Postmodern Legal Movements: Law and Jurisprudence at Century's End (1995) [hereinafter Postmodern Legal Movements].
- 2. "Jurisprudential ideas are rarely born; equally rarely do they die." NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (forthcoming 1995) (manuscript at 3-4, on file with author) [hereinafter PATTERNS OF AMERICAN JURISPRUDENCE].
- 3. See, e.g., Morton Horwitz, Forward: The Constitution Of Change: Legal Fundamentality Without Fundamentalism, 107 HARV. L. REV. 30, 32-33 (1993) (describing how the Enlightenment's picture of art and science as a "mirror of nature" shaped and destabilized the conceptualism of constitutional law during the past half century).

My description of Enlightenment ideology was influenced by ROY BOYNE & ALI RATTANSI, *Theory and Politics of Postmodernism, in* POSTMODERNISM AND SOCIETY (R. Boyne & A. Rattansi eds., 1990). In law, the Enlightenment project can be discovered in forms of legal scholarship seeking to discover some source—either some internal legal logic (e.g., a conceptual process or normative principle) or some external process or principle (e.g., some economic, political or social concept, principle or force)—as law's foundational authority. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 225-75 (1986) (describing and defending a normative foundation of legal decision-making based on the idea of "law as integrity"); HENRY M. HART, JR. & ABERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tentative ed. 1958) (describing and

Legal modernism reflects the confidence that has come from the belief in the powers of legal reason to penetrate the essential mysteries of the legal and social worlds, rendering them amenable to legal authority and control.

Until recently, legal theorists were unaware of the influence of legal modernism. Indeed, legal thinkers did not become aware of the existence of legal modernism until a rival perspective, postmodernism, appeared in the legal academy and challenged the visions, ideas, and practices of modern legal thinkers. In law, postmodernism signals a movement away from forms of legal modernism premised upon the belief in universal truths, core essences, or foundational theories. Postmodernists question the modernist's aspiration to discover the objective truth about the world by challenging the modernist's effort to endow law with qualities of "objectivity," "neutrality," "autonomy," "internal integrity," "consensus," and the like. However, because postmodernism is itself an unstable category (and because the tradition it challenges is also unstable), it ends up meaning many things to different people. Postmodernists would, in fact, resist the effort to reduce the meaning of postmodernism to a single conceptual definition or interpretative strategy.<sup>4</sup>

It would also be a mistake to conclude that jurisprudential postmodernism is something that is fundamentally different from jurisprudential modernism, or that postmodernists harbor some dark desire to be the new jurisprudential masters of the legal system. Postmodern legal criticism should be characterized not by its ability to transcend the style and aesthetic of traditional legal studies but rather by its ambivalent and inexorable link to the current situation in contemporary legal studies. Postmodernism's critical dimension lies in its problematic relationship to the modernist tradition it attempts to identify and criticize. What postmodernists do is intensify dissatisfaction with the narrowness of professional knowledge about the law.

Postmodernists do not, therefore, claim that they can rescue legal modernists from the predicaments and paradoxes of modern law. Indeed, postmodernists recognize and embrace these predicaments and paradoxes in their own narratives and practices. They do this because they believe that the texts, discourse, vocabulary, and grammar of the professional field cannot be "intentionally" overcome by a lone author. Moreover, the existence of predicament and paradox in the texts and discourse of modern legal theorists, as well as those of everyone else, are seen by postmodernists as part of the current

defending a process foundation of legal decision-making); Christopher C. Langdell, A Selection of Cases on the Law of Contracts (1871) (establishing a form of legal logic as the foundation of contract law). Many other examples of this could be cited. *See also* Richard A. Posner, the Problems of Jurisprudence 9-23, 424-33 (1990) (describing the rise and fall of the lawyer's traditional faith in the autonomy of law).

<sup>4.</sup> See POSTMODERN LEGAL MOVEMENTS, supra note 1, at 2-5. See also Stephen M. Feldman, Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice, 88 Nw. U. L. Rev. 1046 (1994).

<sup>5.</sup> See Andreas Huyssen, Mapping the Postmodern, 33 New German Critique 5 (1984).

intellectual "situation" they call the postmodern condition.<sup>6</sup> In other words, postmodernists do not claim that they stand outside of the system they criticize.

In this Essay, I will attempt to offer a description of postmodernism by focusing on how postmodernism relates to the current situation of modern legal studies. In particular, I argue that postmodern legal criticism arises from the attempt of contemporary legal theorists to develop new legal movements in order to overcome a certain predicament. This predicament—the modernist's predicament—has been precipitated by new forms of scholarly legal criticism increasingly departing from the traditional methods and theories that have historically supported the modernist's faith in a universal method and perspective for engaging in meaningful legal analysis. The predicament of modern legal studies is that it has become increasingly difficult to maintain the modernist's faith in an academy and legal culture fragmented by diverse perspectives; methodologies; and, theoretical, as well as cultural, social, political, and literary, traditions.

For much of this century, legal thinkers have worked hard to discover general principles and operative processes that a consensus of the bench, bar, and the academy would regard as the foundational "rules" of the legal system. This effort has increasingly come to be associated with the values and perspectives of a legal culture premised upon the overriding importance of reaching consensus and agreement. Some legal scholars claim that the law enforces a type of consensus based on the views, perspectives, and interests of a particular group in American society. Some believe that modernist legal culture entrenches the professional habits and normative aesthetics of a fictitious and imaginary reasonable, rational person.

Many people believe that the normative discourse of modern law's rational person—the discourse of rights, legal process, and neutral principles—has worked to entrench subtle forms of discrimination against non-traditional cultures. Some people believe that the law and its discourse have failed to take seriously other perspectives and other experiences framed by the lives of Native Americans, Latinos, African-Americans, Asian-Americans, and women and gay people of all cultures. For others, the problem is that the law has failed to develop a more sophisticated understanding of the world based upon the other knowledges and other cultural traditions (e.g., the knowledges and

<sup>6.</sup> For those who identify postmodernism with moral relativism or "nihilism," the arrival of postmodernism in legal studies may seem alien—indeed even frightening. See Pierre Schlag, Values, 6 YALE J. L. & HUMAN. 219, 231-32 (1994). In this essay, I argue that postmodernism must be understood not so much as an oppositional or deviant movement (though to a degree it is), but rather as an inevitable development in the evolution of modern legal studies. I want to insist, as Pierre Schlag has insisted, that if there is something "frightening" or "nihilistic" about postmodernism, it is because a "frightened and weary perspective"—call it legal modernism, or a particular understanding of the "law," feels threatened by its own state of development. Cf. id.

<sup>7.</sup> Contemporary culture, of course, is not monolithic; it is comprised of many smaller cultures. Within each smaller culture one can discover fundamentally different perspectives, life-styles and languages for interpreting and resolving conflict. Hence, while modern law aspires to govern all people of different cultures under a universal "Rule of Law" perspective, the different cultures of society challenge law's claim that there should be one Rule of Law for all people of all cultures. With this realization has come a crisis of legitimacy which many attribute to postmodernism. In law, this "crisis of legitimacy" has been brought about by the destabilizing tendency of the legal modernists' effort to create new movements in law.

traditions of non-Western philosophy, feminism, critical social theory, cognitive theory, etc.).

In response to these frustrations, legal scholars of different political orientations have in the last few decades helped form legal movements attempting to make law more responsive to changing values and attitudes resulting from the diversity and plurality of an increasingly multicultural world. From this effort has come what many now regard as postmodern legal criticism. In questioning the fundamentalism of modern law, postmodernists attempt to bring out the perspectives and narratives of other subject identities, other cultures, and other traditions marginalized and ignored by modernist legal culture. Postmodernism can thus be understood to be a form of "identity" criticism aimed at making law more responsive to the interests and needs of a multicultural world. In this important sense, postmodernism is not just a matter of style or aesthetics but is rather a new form of legal criticism that purports to provoke new questions about the relation between law, culture, and politics.

It is thus fitting that in a legal symposium honoring the 100th year anniversary of a great American law school we pause to consider the intellectual aesthetics, moods, and styles of modern and postmodern forms of legal thought. My effort here is to describe in a very general way the basic pattern, style, and aesthetic of modern and postmodern forms of jurisprudence. I argue that postmodern legal thought is the most recent "cycle" in the development of jurisprudential forms that can be traced back to the early part of this century when legal modernism first emerged. The recent postmodern "cycle" in legal studies presents, however, the very real possibility of a completely new intellectual direction for legal studies—one which signals a potentially transformative paradigm shift in legal thought.

Part I will briefly review the methods and dominant themes of modern legal thought. These themes reflect the intellectual background of twentieth-century legal modernism. I have identified these themes within the scholarship and teaching of two enormously important figures in the intellectual history of American law: Christopher Columbus Langdell and Oliver Wendell Holmes. Part II will attempt to describe contemporary

<sup>8.</sup> I have in mind here the scholarly legal movements of the 1970s and 1980s such as law and economics, critical legal studies, feminist legal theory, law and literature, critical race theory; as well as specific minority critiques of law presented by the gay and lesbian, Asian American, Native American, and Black feminist movements. These movements, and the critiques of law they have created, have brought diverse forms of legal criticism to legal studies that represent a more radical movement away from modern to postmodern jurisprudence. Each of these movements offers a constellation of ideas about law that has served wittingly and unwittingly to bring out marginalized and hidden perspectives within modernist legal culture. What is unique about these movements, and what distinguishes them from the law and society movement of the 1960s is that they signal the possibility of a new era in legal studies developed from a new critical understanding of the relationship between law, language, culture and politics. See POSTMODERN LEGAL MOVEMENTS, supra note 1, at chs. 5-10; see also Gary Minda, Jurisprudence At Century's End, 43 J. LEGAL ED. 27 (1993); Gary Minda, The Jurisprudential Movements of the 1980s, 50 OHIO ST. L. J. 599 (1989); infra notes 63-72 and accompanying text.

<sup>9.</sup> I wish to note at the outset that I am not suggesting that Langdell and Holmes were responsible as originary agents for the development of legal modernism. Rather, Part I attempts to show how the work of Langdell and Holmes exemplifies the themes of modernity that were unfolding during their lifetimes. The point

trends in legal scholarship that arose during the 1970s and 1980s and sowed the seeds for postmodern legal criticism in the 1990s. In Part III, I will focus on two sides of postmodern legal criticism reflected within the work of two prolific contemporary writers and scholars: Judge Richard A. Posner and Professor Pierre Schlag. While they may disagree, I will attempt to show how Posner and Schlag represent two sides of postmodern jurisprudence, just as Langdell and Holmes represented two sides of legal modernism. The conclusion speculates on the meaning of postmodernism for the future of legal studies and also, hopefully, stimulates interest in the study of the contemporary legal version of modernism.

#### I. LEGAL MODERNISM

In America, modernism became a dominant style as social theorists in the late nineteenth century applied the work of Charles Darwin and Adam Smith to social problems.<sup>10</sup> From Darwinism, modern theorists developed the notion that truth and knowledge develop on the basis of an evolutionary process driven by the quest for mastery and perfection.<sup>11</sup> From Smith, modern theorists developed political and social theories of individualism and free choice to explain legal and political concepts of individual liberty. Smith's idea of economic individualism provided support for the image of the "invisible hand" regulating the operation of markets. Nineteenth-century society was thus thought to be regulated by some "ideal" model of the individual.<sup>12</sup> The influence of these ideas in law can be found in the writing and teaching of two of America's greatest legal teachers and thinkers: Christopher Columbus Langdell and Oliver Wendell

is that legal modernism must be understood as a "way of being" and, as such, cannot be attributed to the work of a lone author.

- 10. Undoubtedly, the intellectual condition that initiated the aesthetic of modernism in legal studies developed from Enlightenment philosophers who expressed faith in the powers of human reason to unlock the mysteries of the world. See, e.g., IMMANUEL KANT, CRITIQUE OF PURE REASON, (Norman K. Smith trans., St. Martin's Press, 1965). For a recent defense of this tradition in contemporary legal studies, see Martha C. Nussbaum, Valuing Values: A Case for Reasoned Commitment, 6 YALE J. L. & HUMAN. 197 (1994).
- 11. Darwin's evolutionary thesis located humanity within the animal kingdom and "made it plausible to treat human mental capacities as evolved functions of natural organisms, arising from simpler forms of animal behavior as a result of their survival-promoting tendencies." Thomas C. Grey, Holmes and Legal Pragmatism, 41 STAN. L. REV. 787, 796 (1989). This evolutionary form of thinking encouraged philosophers and social thinkers to internalize a positivist autology that separated mind from matter. It enabled intellectuals to contemplate the possibility that nonbiological processes of social relations developed in an evolutionary manner. Scholars in various academic fields used evolutionary thinking in their analyses of nonbiological processes, such as social and political events. See EDWARD A. PURCELL, THE CRISIS OF DEMOCRATIC THEORY, SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 5 (1973). Scientific naturalism nurtured the modernists' obsession with the existence of autonomous spheres of pure reason for discovering the objective order of the universe. As scientific naturalism spread, American lawyers began to develop naturalistic and scientific theories for law and jurisprudence.
- 12. See LAWRENCE FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE 27, 31-2 (1990) (describing how nineteenth-century individualist ideology "presupposed a particular kind of society and generated a particular kind of legal order").

Holmes.<sup>13</sup> Both men developed modern approaches to legal studies based on ideas of scientific naturalism and competitive individualism which can be traced to Darwin and Smith.

### A. Langdell

Langdell, of course, is the man who is best known today for a number of spurious notions about law and legal education.<sup>14</sup> Langdell believed that "law is a science," that the law school classroom is analogous to a medical school laboratory, and that the case method of legal instruction<sup>15</sup> is analogous to what medical students do when they dissect cadavers under the tutelage of a trained medical doctor for purposes of learning about the laws of biology and anatomy. The following statement from the preface of Langdell's contracts casebook, *Selection of Cases on the Law of Contracts*, <sup>16</sup> the first modern law casebook to be published in America, captures the essence of his pedagogy:

It is indispensable to establish at least two things, first that law is a science; secondly that all the available materials of that science are contained in the printed books. . . . But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless, and worse than useless, for any purpose of systematic study. Moreover the number of fundamental legal doctrines is much less than is commonly supposed; the many great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found

<sup>13.</sup> See also PATTERNS OF AMERICAN JURISPRUDENCE, supra note 2, at ch. 1 (examining the patterns of American jurisprudence developed from the ideas of Langdell and Holmes).

<sup>14.</sup> It has been said that "[w]ith [Langdell's] appointment [at Harvard], modern American legal education began to evolve." PATTERNS OF AMERICAN JURISPRUDENCE, supra note 2, at 16. Duxbury notes that Langdell was the protegé of Harvard's president, Charles William Eliot. PATTERNS OF AMERICAN JURISPRUDENCE, supra note 2, at 16. Eliot, a mathematician and chemist, while at the Massachusetts Institute of Technology, developed the "laboratory classroom method" for teaching of chemistry. When Eliot was later appointed president of Harvard University, he advocated the use of the "laboratory method" of instruction for other disciplines. According to Duxbury, "Langdell looked to Eliot's method of teaching to find the separate but compatible 'jurisdiction' which would provide him with the precendential authority and guidance that he needed" to develop and enhance the reputation of Harvard Law. James Bar Ames, Langdell's successor at Harvard, was largely responsible for successfully launching the case method of law teaching at Harvard. PATTERNS OF AMERICAN JURISPRUDENCE, supra note 2, at 17.

<sup>15.</sup> The Langdellian initiative was launched with the case method of instruction, which dispensed with the traditional lecture method of instruction and eliminated the necessity of clinical experience. The basic idea was that students would be required to read all the relevant cases in a field of law. The cases were selected by the law professor and published as a casebook. The professor would then engage a Socratic-method of rigorous questioning in the classroom for the purposes of guiding students in the discovery of the "true" principles of law. Underlying Langdell's case method was faith in the powers of reason to uncover the essential truths of the law. PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 17.

<sup>16.</sup> LANGDELL, supra note 3.

in its proper place, and nowhere else, they would cease to be formidable from their number.<sup>17</sup>

This statement expresses one of the great unfulfilled promises of legal modernism: the belief that the deep structure of law is knowable, that fundamental principles can be discovered from an examination of complex phenomena, and that the secrets of the law are intellectually and rationally discoverable through the application of the correct scientific-like methodology. These ideas are characteristic of the scientific naturalism associated with Darwinian thought of the early nineteenth century.

Langdell's idea of "law as science" thus developed from the notion that law was a "mirror of nature." Law was thought to be based on a natural and fixed evolutionary principle not unlike what Darwin observed in his evolutionary studies of the animal kingdom. Law, like science, was viewed by Langdell as involving a progressive and incremental process that could be discovered like an empirical fact. Ideas of scientific naturalism, associated with Darwin's theory of evolution, thus helped to frame a highly influential perspective for American legal studies.

Langdell's version of scientific naturalism enabled legal analysts like Langdell to believe that they could, if they employed the correct method and perspective, discover "right answers" for the legal problem at hand. Langdell argued that the universal principles of law could be discovered by studying a limited set of appellate court decisions for each field of law. It was the law professor's responsibility to collect these cases in a single text, called a casebook, and to instruct law students how to discover the principles of law in the cases through Socratic case instruction.<sup>19</sup>

It has been said that Langdell was "a reclusive, unworldly and uncharismatic scholar, a poor communicator who suffered from failing eyesight." For all of his flaws, however, Langdell was a smashing success in bringing a new generation of professional academic lawyers to the law school who, following Langdell's model of legal science, modernized legal education and the study of law. Indeed, largely as a result of the Langdellians at Harvard, the modern law school as we know it was born. In keeping with the spirit of

- 17. LANGDELL, supra note 3, at viii.
- 18. The picture of law and science as a "mirror of nature" is the Enlightenment's picture of art and science. *See* Horwitz, *supra* note 3, at 32-33 (describing how the picture of a "mirror of nature" describes the influence of modernism in constitutional law for the past half of this century).
  - 19. See PATTERNS OF AMERICAN JURISPRUDENCE, supra note 2, at 17-18.
- 20. PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 23 (citing SAMUEL WILLISTON, LIFE AND LAW 200 (1940)).
- 21. Prior to Langdell's arrival at Harvard in 1869, American law schools were largely trade schools operated by full time practicing lawyers and judges who lectured by reading verbatim from reported cases, legal treatises and legislation. The vast majority of law students in the pre-Langdellian era learned the law by gaining employment as an apprentice in law offices. See PATTERNS OF AMERICAN JURISPRUDENCE, supra note 2, at 19-20.
- 22. Following Langdell's model at Harvard, a new generation of academic lawyers gave up on private practice, traditional lectures, and rote memorization, and instead turned their attention to the theoretical study and teaching of law and legal reasoning. *See* PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 19-20. Law teachers became serious "academic lawyers" who could claim for the very first time that law teaching was

Enlightenment, Langdell had faith in the powers of science and reason to uncover universal truths.

Langdell's legal science has since evolved to the modern view that law is a complete, formal, and conceptually ordered system that satisfies the legal norms of objectivity and consistency. Completeness meant that this system was capable of providing uniquely correct solutions or "right answers" for every case brought for adjudication.<sup>23</sup> Formality meant that the system was capable of dictating logically correct answers through the application of abstract principles derived from cases.<sup>24</sup> The system was conceptually ordered to the extent that its substantive bottom-level rules were coherently derived from a small number of relatively abstract principles and concepts, creating a holistic system.<sup>25</sup> These norms came to represent the classical orthodox system of legal modernism reflected within the styles of legal thought known as legal formalism, legal positivism, or what many have called conceptual legal thought.<sup>26</sup>

If law could be a science, then legal studies could be approached from the "scientific perspective" required for laboratory experiments testing the validity of a hypothesis. Law professors, following Langdell's vision of legal science, could claim that the law could be analyzed as a system consisting of a set of universal principles, policies, and rules. The reduction of law to scientific concepts systematized by an abstract general method also rendered legal apprenticeship largely obsolete as a means for professional law training, since it was now thought that law students no longer needed to study law as a practice; all that one needed was a classroom, casebooks, and a teacher trained in the Socratic method of instruction.<sup>27</sup>

The modern American law school, modelled after Langdell's Harvard Law School, subsequently enjoyed membership in the university community with equal, if not greater, stature and status.<sup>28</sup> Law professors could consequently become serious academics in the

- 23. See Thomas C. Grey, Langdell's Orthodoxy, 45 U. PITT. L. REV. 1, 6-8 (1983).
- 24. Id. at 8.
- 25. Id.

a distinct academic endeavor requiring special skills and insight. As Langdell himself explained: "What qualifies a person... to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law." Christopher C. Langdell, *Harvard Celebration Speeches*, 3 LAW Q. REV. 124 (1887).

<sup>26.</sup> See POSTMODERN LEGAL MOVEMENTS, supra note 1, at ch. 2. "Conceptualism is the project of structuring law into a system of classification made up of relatively abstract principles and categories." Grey, Holmes and Legal Pragmatism, supra note 11, at 822. Conceptualism ("law as logic") is what Karl Llewellyn called the "Grand Style" in American legal thought—a form of logic that classifies legal phenomena on the basis of a few fundamental abstract principles and concepts developed from the distinct methods of legal reasoning. See KARL N. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 35-45 (1960). Grey states that conceptualism "describes legal theories that place a high value on the creation (or discovery) of a few fundamental principles and concepts at the heart of a system, whether reasoning from them is formal or informal." Grey, Langdell's Orthodoxy, supra note 23, at 9-10.

<sup>27.</sup> Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1455 (1990).

<sup>28.</sup> *Id. See also* Robert Stevens, *Two Cheers for 1870: The American Law School, in* LAW IN AMERICAN HISTORY 405 (D. Fleming & B. Bailyn eds., 1971).

university, joining other professors in the common quest for the discovery of truth. These developments permitted law to be studied as a "normal science," and it provided legal academics with faith in their ability to overcome the predicament of modern law through the development of a professional method and discourse to locate and defend the internal logic of the law and its processes.

#### B. Holmes

The course of modern American jurisprudence was influenced by another great legal modernist: Oliver Wendell Holmes.<sup>29</sup> Holmes, of course, is a legal icon in the history of American legal thought; his humanity was long ago turned to marble as hordes of historians and legal theorists idolized and mystified the man.<sup>30</sup> Nonetheless, there is no denying Holmes's heavy hand on the course of American jurisprudence. Indeed, the modern era in jurisprudence did not bloom full-flower until Holmes arrived on the scene. It has been said that "[i]f Langdell gave the new jurisprudence its methodology, Holmes, more than any one else, gave it its content."<sup>31</sup> For this, Holmes is now regarded as "one of the most modernist of modern thinkers."<sup>32</sup>

Holmes's modernism, however, was different from that of Langdell. Langdell embraced the deductive method of formal logic and thus believed in the possibility of discovering solutions to law's problems through human reason. Holmes, on the other hand, was a skeptic. He downplayed the importance of the deductive method of formal logic and instead directed his attention to the world of brute power and experience. Holmes's skepticism enabled him to accept uncertainty and the intellectual darkness that comes from doubting truth.<sup>33</sup> As John Patrick Diggins has recently explained, Holmes's "genius was to shift legal thought from theory to practice. [Holmes believed that the] student and scholar should study not what the judges know but what they do, and regard law as a function of need rather than an embodiment of truth."<sup>34</sup>

<sup>29.</sup> Holmes, America's most famous jurist, was a student at Langdell's Harvard Law School. He briefly served as a professor at the law school until becoming a judge on the Massachusetts Supreme Court. He eventually took a seat on the United States Supreme Court and remained active on that bench into his nineties. See, e.g., BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 376-96 (1993). Holmes was a deeply skeptical, but practical man. Holmes's professional life, and thus his view of jurisprudence, were shaped by his experience as a judge.

<sup>30.</sup> As the late Grant Gilmore once explained: "Holmes is a strange, enigmatic figure. Put out of your mind the picture of the tolerant aristocrat, the great liberal, the eloquent defender of our liberties, the Yankee from Olympus. All that was myth, concocted principally by Harold Laski and Felix Frankfurter, about the time of World War I." Grant Gilmore, The Ages of American Law 48-49 (1977) [hereinafter Ages of American Law].

<sup>31.</sup> Id. at 48.

<sup>32.</sup> JOHN PATRICK DIGGINS, THE PROMISE OF PRAGMATISM, 344 (1994) [hereinafter PROMISE OF PRAGMATISM]. Diggins goes on to suggest that "Holmes is almost postmodern in that the doubts and tensions that troubled other thinkers like Adams—the tension between knowledge and experience, events and meaning, truth and change—scarcely concerned Holmes. . . . Holmes savored life. A natural skeptic, he felt no need to flee the 'irritation of doubt' to arrive at settled beliefs." *Id*.

<sup>33.</sup> Id

<sup>34.</sup> Id. at 350-51.

For Holmes, the search for truth ultimately depended upon a struggle of competition in the open market of ideas. Holmes was thus critical of formalistic forms of jurisprudence because he felt that a jurisprudence based exclusively on logic would fail to take account of forms of knowledge coming from human experience.<sup>35</sup> While Langdell focused on the logic of cases in the printed books, Holmes looked to the "felt necessities of the times" drawn from his own experiences—as an officer during the Civil War, wounded in three engagements with the enemy, and struggling to survive and succeed. Much later, Holmes, the jurist, would declare: "The life of the law has not been logic: it has been experience." Holmes thus accepted the contingent and arbitrary nature of legal truth in a world of brute power.

Holmes was a pragmatist of sorts.<sup>37</sup> In the opening passage of *The Common Law*, Holmes enunciated what contemporary legal thinkers have identified as "central, pragmatic tenets" of American law.<sup>38</sup> In conceiving "law as experience," Holmes echoed the views of American pragmatist philosophers such as John Dewey and Charles Peirce, who rejected the foundationalist tradition in Western philosophy and accepted the thesis that knowledge and human thought is situated within the social and habitual practices,

35. While many have regarded Holmes as an "unequivocal anti-formalist," Neil Duxbury argues that Holmes's "jurisprudential work [was] every bit as formalistic as anything that came from the pen of Langdell." PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 40. Professor Diggins, on the other hand, has found within Holmes' work anti-formalistic predilections that are almost postmodern in character. *See* PROMISE OF PRAGMATISM, *supra* note 32, at 344.

It is not surprising that contemporary readers like Duxbury and Diggins might reach different conclusions about the meaning of Holmes's work. Holmes was a man who brought to light the full implications of the ambiguities and ambivalances of modern legal thought. He has, therefore, provided historians with ideas that can be interpreted to support many contemporary theories about the law. For this reason, Professor Diggins was apt in his observation that Holmes "was one of the most modernist of modern thinkers." PROMISE OF PRAGMATISM, *supra* note 32, at 44.

- 36. OLIVER W. HOLMES, THE COMMON LAW 5 (Mark D. Howe ed., 1963).
- 37. See Grey, Holmes and Legal Pragmatism, supra note 11, at 795. It is generally recognized that Holmes was influenced by the American pragmatist philosophy of Charles Sanders Peirce and John Dewey. Grey, Holmes and Legal Pragmatism, supra note 11, at 788. See also POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 3, at 239-44 (comparing Holmes to Nietzsche and pragmatism); Richard A. Posner, Introduction in THE ESSENTIAL HOLMES SECTIONS FROM THE LETTERS ix (1992).

It is far from settled whether Holmes was a philosophical pragmatist in the tradition associated with Peirce, James and Dewey. Peirce, James and Dewey were never willing to accept Holmes as a fellow pragmatist and, as Diggins has noted, Holmes himself was never prepared to accept the three pragmatic philosophers as his intellectual equal. See Promise of Pragmatism, supra note 32, at 345. Holmes's pragmatic stance in law should be understood as a form of legal pragmatism as distinguished from the pragmatic philosophy associated with Peirce, James and Dewey. Holmes's view of law as a "science of prediction" was pragmatic in spirit, but Holmes's instrumentalism (law is a science of experience, facts and deduction drawn from context) offered a method of formal logic that Holmes himself believed to be a tough-minded alternative to the philosophy of pragmatism. "In Holmes' [sic] estimate, pragmatism lacked tough-mindedness and allowed sentiment to do the work of thought." Promise of Pragmatism, supra note 32, at 346. See also infra notes 40, 44.

38. See Grey, Holmes and Legal Pragmatism, supra note 11, at 788.

"experiences," or "forms of life" of culture.<sup>39</sup> For Holmes, "law [was] constituted of practices—contextual, situated, rooted in custom and shared expectations."<sup>40</sup> Holmes believed that law should be studied as a "profession" or "business-like" calling to satisfy specific societal needs and functions.<sup>41</sup> He thus believed that judges had a duty to weigh considerations of social advantage in decision making, and he practiced his belief by grounding his own judgment in social and historical context.<sup>42</sup>

Influenced by American pragmatist philosophers of his day,<sup>43</sup> Holmes thus favored a practical and contextualist understanding of law.<sup>44</sup> Holmes admonished law students of his day to study economics and statistics and to adopt the discipline of the social scientist in their studies because he wanted law students to deepen their understanding of the relation between law and society.<sup>45</sup> Holmes embraced Langdell's notion that law was like a science; but, for Holmes, the "science" was of the softer version found in the social science curriculum.<sup>46</sup> Thus, although Holmes believed that law ought to be a science, it was a science of experience, facts, and induction drawn from social and historical

- 39. The sources and analysis of this point are developed more fully in Grey, *Holmes and Legal Pragmatism*, *supra* note 11, at 793-801. Holmes was not an unequivocal pragmatist; he never declared that he shared the same pragmatist premises of Peirce, James, or Dewey. *See also supra* note 37 and *infra* note 44.
- 40. Grey, *Holmes and Legal Pragmatism, supra* note 11, at 805. Holmes believed that the meaning of law must be situated in the world of "felt necessities" of intuition, prejudice, tradition, and social context. *See* HOLMES, THE COMMON LAW, *supra* note 36, at 1.
  - 41. See Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 458-59 (1897).
  - 42. See, e.g., Vegelagh v. Gunter, 44 N.E. 1077 (Mass. 1896) (Holmes, J., dissenting).
- 43. Holmes was a member of the Metaphysical Club, a discussion group that met regularly in Boston and Cambridge from 1870 to 1872. Members of this club included, in addition to Holmes, a number of leading American pragmatic philosophers such as William James and Charles Peirce. See AGES OF AMERICAN LAW, supra note 30, at 50. It is a fair assumption that Holmes was influenced by the pragmatic theories of these philosophers. See, e.g., Grey, Holmes and Legal Pragmatism, supra note 11, at 788; Catharine W. Hantzis, Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr., 82 Nw. U. L. REV. 541, 580-90 (1988). But to say that Holmes was a pragmatist is controversial. Holmes may have embraced ideas associated with the philosophy of pragmatism, but the label does not easily "stick" to Holmes, and it can be misleading as to what Holmes believed. See supra note 37.
- 44. For Holmes, truth was a function of social power, and law expressed that power. "The felt necessities of the time," Holmes wrote, "the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." HOLMES, THE COMMON LAW, supra note 36, at 1. Holmes thus criticized Langdell for giving too much importance to the power of syllogism and logic. He believed that any generalized theory of law would have to take into account and respond to social conditions. For Holmes, the conceptual order of the legal system was merely a "practical aid in teaching and understanding law." Grey, Holmes and Legal Pragmatism, supra note 11, at 816.
- 45. See Holmes, The Path of the Law, supra note 41, at 469. ("For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").
  - 46. See G. Edward White, The Rise and Fall of Justice Holmes, 39 U. CHI. L. REV. 51, 56 (1971).

context.<sup>47</sup> Consequently, in Holmes' jurisprudence, legal study was to be approached from the pragmatic perspective of a social scientist and law was to be studied as a "science of prediction." <sup>48</sup>

Holmes's pragmatic insight has enabled contemporary legal scholars to accept the modern idea that "the creation of legal meaning—[what the late Robert Cover called] 'jurisgenesis'—takes place always through an essentially cultural medium."<sup>49</sup> Holmes's hypothesis, as the late Gilmore has said, "was that inquiry is a never-ending process whose purpose is to resolve doubts generated when experience does not mesh with preconceived theory."<sup>50</sup> This hypothesis has led modern-day legal scholars to argue that law must be understood as a contingent political social practice.<sup>51</sup> The notion that the meaning of law can only be found in the "struggle for acceptance" has enabled modern legal theorists to approach legal studies from a more pragmatic and normative perspective. Legal thinkers have taken the position that the law should establish the moral rightness of its rules.<sup>52</sup>

- 47. See R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION 115 (1984).
- 48. See PATTERNS OF AMERICAN JURISPRUDENCE, supra note 2, at 41. In emphasizing the need for developing external social standards for the law, Holmes advanced a theory of judicial decisionmaking that attempted to separate law from morality. Holmes believed that law should be responsive to social conditions and that it was the responsibility of judges to respect the wishes of the majority. Holmes thus believed that judges should forsake their own subjective understanding of the law and instead strive to decide disputes by employing external, objective standards developed to advance policy outcomes reached in the legislative and political arenas of society. In Holmes's jurisprudence, the law was a medium for preserving the social tranquility of majoritarian politics. Modern legal scholars, following Holmes, exclude ethical and moral considerations from their purview, and they, like Holmes, understand that the meaning of law can only be gleaned from an examination of law's contextual setting, including the normative social practices and habits of the entire community.

Holmesian jurisprudence thus set the stage for the divorce of moral considerations from legal studies and committed the next generation of legal scholars to demonstrating the objectivity of law. This shift in ideology has led to forms of sociological jurisprudence and interdisciplinary legal studies, which have brought to the study of law a new form of interdisciplinary formalism not unlike the formalism proposed by Langdell. *See* PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 40 (arguing that Holmes was as much a formalist as Langdell).

- 49. See Robert M. Cover, Forward: Nomos and Narrative, 97 HARV. L. REV. 1, 11 (1983). See also Robert Post, The Relative Autonomous Discourse of Law, in LAW AND THE ORDER OF CULTURE vii (1991).
  - 50. AGES OF AMERICAN LAW, supra note 30, at 50.
- 51. As Thomas Grey noted, "[t]he application of this idea to law has been one of the central themes of the Critical Legal Studies movement." Grey, *Holmes and Legal Pragmatism, supra* note 11, at 814 (citing Robert W. Gordon, *New Developments in Legal Theory, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281, 286 (D. Kairys ed., 1982)).
- 52. Thus, Benjamin N. Cardozo, for example, following Holmes's pragmatic philosophy, argued that "[t]he judge interprets the social conscience, and gives effect to it in law, but in so doing he helps to form and modify the conscience he interprets. Discovery and creation react upon one another." THE GROWTH OF THE LAW 96-97 (1924).

# C. The Two Sides of Legal Modernism

When woven together, the motifs of legal modernism found in the work of Langdell and Holmes reflect the intellectual mood of the post-World War II generation of legal scholars who believed in the possibility of identifying a distinct legal method for yielding a distinct set of correct answers for law's many problems.<sup>53</sup> The post-war generation came of age during what Gilmore called "the Age of Faith"—a time when lawyers, judges, and a new breed of law professors were "so confident, so self-assured, so convinced beyond the shadow of a doubt, that they were serving not only righteousness but truth."<sup>54</sup> For the post-World War II generation, Langdell and Holmes symbolized the confidence of legal scholars to develop an autonomous, coherent, rational, and normative concept of law.<sup>55</sup>

Gilmore stated that "Langdellian jurisprudence and Holmesian jurisprudence were like the parallel lines which have arrived at infinity and have met." The lines of legal thought derived from these two American legal thinkers establish the contours of the dominant styles of legal modernism in American jurisprudence. Langdell's faith in the scientific method (formalism) combined with Holmes' belief in the evolutionary progress of law (pragmatic instrumentalism) and work together to affirm the conflicting objectives and diverse styles of modern legal studies. The most extraordinary aspect of modern jurisprudence has been the belief that Langdellian and Holmesian jurisprudence could somehow be synthesized to establish an autonomous and universal jurisprudence based on a belief in the ideal of one true "Rule of Law."

The history of modern legal thought is a story of a series of failed attempts to reconcile and synthesize these two styles of jurisprudence. The attempts to synthesize the ideas of Langdell and Holmes have never been successful because these two great legal thinkers expressed contradictory views about the meaning of law in the modern age. Langdellian formalism valued and protected law's autonomy by minimizing the instability resulting from uncertainty. Holmesian pragmatic instrumentalism (law should serve the interest of the majority), on the other hand, valued and protected law's autonomy by permitting law to adapt and change to new circumstances. The two styles of legal reasoning known today as *formalism* and *instrumentalism* capture the essence of the two conflicting and indeterminate sides of modern legal thought.

Modern legal formalists have attempted to develop a platonic-like theory of law based on the discovery of the permanent and unchanging internal logic of the law.<sup>57</sup> Other formalists have attempted to defend an understanding of law based on the Langdellian

<sup>53.</sup> See, e.g., CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 216 n.32 (1991) (claiming that "there is a distinct method which is the legal method, [which] . . . can be deployed more or less well, and [which] . . . yields a distinct set of answers more or less out of itself").

<sup>54.</sup> AGES OF AMERICAN LAW, supra note 30, at 41.

<sup>55.</sup> This is not the place to review the intellectual history of the post-World War II generation of legal scholars. For my modest attempt in summarizing this history, see POSTMODERN LEGAL MOVEMENTS, *supra* note 1, at chs. 1-4.

<sup>56.</sup> AGES OF AMERICAN LAW, supra note 30, at 56.

<sup>57.</sup> See POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 3, at 14.

notion that legal method follows the methodology of the inductive sciences.<sup>58</sup> Modernday formalists "insist that law contains within itself all the resources necessary for the correct resolution of legal disputes, no matter how momentous the dispute (it might be over racial sexual iustice. abortion. economic liberty. punishment—whatever)."59 Legal instrumentalists, on the other hand, look outside the law for its missing foundation. Instrumentalists view the law as an instrument or medium for accomplishing objectives and goals. Their standard is an objective one framed by either some non-legal methodology developed for legal studies (e.g., economic, political, or other social science methodology) or the pragmatic intuition of the legal analyst seeking to accomplish a particular task.60

Legal formalists and instrumentalists share a deep-seated belief that a foundation exists to legitimate law's assertion of some self-evident truth about law and the legal system. Legal formalists believe that the foundation exists within some internal logic; within the process of law; in some non-legal source such as economics, history, politics, and the like; or, in the pragmatic intuition of legal actors themselves. Legal modernists, both formalists and instrumentalists, thus believe that there is a rational structure to law and culture independent of the beliefs of any particular people. Legal modernists share the view that this structure exists and can be used objectively to describe and represent the reality of things "out there" in the law and in the world at large. A central distinguishing motif of legal modernism is reflected in the picture of law as a "mirror of nature."

Legal modernism has come to characterize the interpretive practice of modern legal scholars as one which "reflects" the truth of the world "out there." This practice is based on an understanding of language that assumes that words and conceptual ideas are capable of objectively capturing the meaning of events the law seeks to describe and control. The professional language of law thus uses abstract categories and universal classification systems to construct rules of law that satisfy jurisprudential prerequisites of generality and objectivity. Modern liberal scholars assume that representational dichotomies such as object/subject, law/society, substance/procedure, and public/private, constrain the power of judicial interpretation. Hence, when they are in role, at the podium, before the bar, behind the bench, etc., legal moderns understand themselves to be capable of excluding their subjective identities from their analyses of the law.<sup>62</sup>

In summary, legal modernism is a term that attempts to identify and describe the aesthetics of modernism within the discourse and practice of American law. Legal modernism reflects a set of beliefs exemplified in the work of Langdell and Holmes, which has influenced the way modern legal theorists experience the law in their writing

<sup>58.</sup> See POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 3, at 15.

<sup>59.</sup> See POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 3, at 424.

<sup>60.</sup> See POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 3, at 424 (describing the instrumental judicial philosophy of Benjamin N. Cardozo).

<sup>61.</sup> Morton Horwitz, drawing from Richard Rorty, has noted how this picture of law as the "mirror of nature" characterizes not only modern constitutional law, but also modern art and modern science. *See* Horwitz, *supra* note 3, at 32 (citing RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 333 (1979)).

<sup>62.</sup> They are capable, in other words, of "becoming relatively empty, abstract and universal subjects." Letter to author from Pierre Schlag (Dec. 22, 1994) (on file with author).

and teaching. Legal modernism is neither a theory nor a philosophy but, rather, a distinctive strategy or set of strategies utilized by modern theorists in reacting to the predicaments of modern law. Legal modernism has never realized its goals; and, for many, the faith in the projects of legal modernism has come to establish a type of "language game" or "language practice" erected upon the object of perfection for perfection's sake.

#### II. CONTEMPORARY DEVELOPMENTS IN LEGAL STUDIES

By the late 1960s it was apparent that the political and legal consensus that seemingly held together the modernist's vision of law no longer reflected the mood and temperament of those who personally experienced the conflict and divisions of Vietnam; Watergate; the race relations crisis; and, the cultural, sexual, and gender revolutions. American society was becoming ethnically, racially, and economically divided. These divisions were revealed in the contemporary legal controversies of the day. There was no consensus to which law could appeal because there was no consensus "out there." The contradictory mood and temperament of the 1960s made it difficult for anyone to argue the possibility of reaching a consensus through law. Modern jurisprudence was confronted with a crisis of confidence that ultimately raised methodological issues about the validity of some of law's most basic conceptual and normative justifications.

Throughout the late 1970s and 1980s, a new generation of legal academics helped to form movements in legal thought that offered new discourses about the law and legal decision-making. During the decades of the 1970s and 1980s at least five new jurisprudential movements—law and economics, critical legal studies, feminist legal theory, law and literature, and critical race theory—came onto the legal scene and began questioning the once-dominant hold of modern jurisprudence. Legal scholars began to examine aspects of the interrelationship between law and culture. The combined result of these new forms of legal criticism challenged a number of core assumptions central to the work of modern legal scholars.

Law and economics scholars argued that modern liberal scholars had internalized a "political" view of law as an autonomous discipline. This view assumed that law was "a subject properly entrusted to persons trained in law and in nothing else." They asserted that the modern modes of legal thinking were "old-fashioned, passé, tired"; that traditional legal scholars ignored the insights of other disciplines (namely, economics) and failed to contemplate that a political consensus might not be sustainable for legal decision-making. Law and economics scholars maintained that it was "wrong" to assume that legal problems could be informed by a fixed set of premises and a single method of argument. Law and economics scholars looked beyond the law to develop new determinate theories for establishing law's legitimacy.

Critical legal studies (CLS) scholars ("crits"), in turn, argued that "it just isn't possible to do legal scholarship without making [ideological] choices" about how to

<sup>63.</sup> Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 762 (1987).

<sup>64.</sup> Id. at 773.

<sup>65.</sup> Id.

explore particular issues and paths of theoretical inquiry.<sup>66</sup> Crits claimed that "ideology is commitment" whether it is consciously or unconsciously acknowledged.<sup>67</sup> In drawing from Foucault's insight that "power comes from everywhere," crits developed a *post-realist* analysis of the relation between power and knowledge to show how legal institutions and legal analysis itself creates and perpetuates social power.<sup>68</sup>

Feminist scholars, in turn, rejected the notion that law could be studied as an autonomous system abstracted from the reality of gender differences. Feminist scholars argued that claims of objective and universal law mask discriminatory content and application under male-constructed norms of jurisprudence. Feminist critics looked beyond the law to ascertain how the traditional understanding of adjudication reflects a cultural perspective that fails to respect the realities of women in the world. Like law and economics scholars, feminist legal scholars evaluated the effectiveness of legal rules by judging their instrumental capacity in promoting the well-being of women. Like CLS scholars, feminist legal scholars argued that law must be approached from an ideological perspective, but one which focuses on gender differences and the social basis of gender rather than just politics in general.<sup>69</sup>

Law and literature scholars argued that contemporary legal methods taught in legal education are representative of "a craft that has been dead in the water since the late fifties." They advance insights from literary studies and the application of new forms of literary criticism in an effort to "jump-start legal education's engine." The narrative and interpretive practices of this movement have provided an important literary medium for stimulating a more literary understanding about how law might serve human goals in a more just world.

Critical race theory has offered its own narratives and critical methodologies to underscore how traditional theories about law fail to account for the experiences and perspectives of African Americans and other people of color. Critical race theory seeks to expose the "ways in which those in power have socially constructed the very concept of race over time, that is, the extent to which White power has transformed certain differences in color, culture, behavior and outlook into hierarchies of privilege and subordination." The "essentialism of universal sameness [between White and Black] is rejected" in order to acknowledge "differences between Blacks and Whites that are 'sufficiently' real, namely, differences in experience, outlook, and response."

These proliferating legal discourses created the critical space for new and different discourses to develop within legal studies. New movements in the law transformed the

- 66. DUNCAN KENNEDY, SEXY DRESSING, ETC. 68 (1993).
- 67. See POSTMODERN LEGAL MOVEMENTS, supra note 1, at 106, 108.
- 68. See POSTMODERN LEGAL MOVEMENTS, supra note 1, at 120-21.
- 69. See POSTMODERN LEGAL MOVEMENTS, supra note 1, at 128-48.
- 70. John Henry Schlegel, Searching for Archimedes—Legal Education, Legal Scholarship, and Liberal Ideology, 34 J. LEGAL EDUC. 103, 103 (1984).
- 71. David Ray Papke, Problems with an Uninvited Guest: Richard A. Posner and the Law and Literature Movement, 69 B.U. L. REV. 1067 (1989).
- 72. Anthony E. Cook, Symposium on Race Consciousness and Legal Scholarship: The Spiritual Movement Towards Justice, 1992 U. ILL. L. REV. 1007, 1008.
  - 73. Id. at 1009.

way legal scholars talk and think about the law. Today, legal scholars examine how legal discourse affirms, excludes, marginalizes, and ignores different discourses in the communal conversation. This culturally based inquiry has led to the discovery of competing communal languages for developing new legal languages in law. The different intellectual agendas of different cultural groups, and the intellectual orientation of those espousing them, provoked a multicultural form of legal criticism which is now aimed at bringing out the perspectives and narratives of cultures and traditions marginalized and ignored by the dominant discourse of modern law. By 1990, legal studies in America could no longer claim to be based on an autonomous narrative or discourse of law.

The discourse of law, what I call "law talk," fostered new dialectical discourses defined by economic analysis, critical legal studies, feminism, literature, and race consciousness. By the late 1980s, lesbian and gay legal scholars launched the gay and lesbian legal studies movement devoted to the development of a new legal discourse aimed at correcting the biases and inaccurate views of sexual orientation in Western legal culture. William N. Eskridge, Jr. has articulated a "Gaylegal Agenda" for American law developed from the discourse of the counter-culture of the gay and lesbian communities. One important goal of gaylegal discourse is "to provide more reliable information and rigorous legal arguments for discussions of issues important to the bisexual, gay, and lesbian communities; and to criticize laws and legal interpretations that penalize or stigmatize [bisexuals, gays and lesbians]."

Similarly, Native American legal scholars have recently argued that Western jurisprudence has developed an assimilationist discourse that has been used as a sword against Native American cultures to prevent their diversity from becoming part of the "official" American culture.<sup>77</sup> Native American law is aimed at preserving the traditions of Indian tribalism and protecting their unique discourses of law and justice from the assimilationist tide of American law.<sup>78</sup>

Asian legal scholars have also recently joined the legal academy in increasing numbers, proclaiming the existence of an Asian American movement that offers a new critical race-conscious discourse to reverse the problem of discrimination against Asian Americans. These scholars claim to offer a narrative account of exclusion and marginalization from the perspective of Asian Americans. Race discrimination is thus shown to have many faces and colors; its harms are not the same for all minorities.

<sup>74.</sup> An early example of Gaylaw jurisprudence was Rhonda R. Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 HASTINGS L.J. 799 (1979).

<sup>75.</sup> See William N. Eskridge, Jr., A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda, 102 YALE L.J. 333 (1992). Eskridge is a Professor of law at Georgetown University Law Center.

<sup>76.</sup> Id. at 335.

<sup>77.</sup> See ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990). See also Symposium, Native American Law, 28 Ga. L. Rev. 299 (1994).

<sup>78.</sup> See Joseph William Singer, Well Settled?: The Increasing Weight of History in American Indian Land Claims, 28 GA. L. REV. 481 (1994); Kevin J. Worthen, Sword Or Shield: The Past and Future Impact of Western Legal Thought on American Indian Sovereignty, 104 HARV. L. REV. 1372 (1991).

<sup>79.</sup> See Robert S. Chang, Toward An Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 CAL. L. REV. 1241 (1993).

Another offspring from critical race theory has been Black feminist discourse which offers its own legal narratives to capture the unique situation and voice of black women. Black feminist discourse arises from the intersection of interests of women who experience discrimination both as women and as people of color. The intersection of race and gender has enabled Black feminists to discover a unique discourse of race and sex discrimination unique to Black women. The Black feminist critique of antidiscrimination law has addressed the way the modern construction of sex and race consciousness has ignored the experience of Black women. Embracing the intersection of race and gender, Black feminists have started to develop a critique of law that speaks the language of those women located at the intersection.<sup>80</sup>

The proliferation of multicultural legal criticism has refocused legal studies on the importance of understanding how culture shapes and influences the values, beliefs, and thoughts of legal subjects. The study of jurisprudence is consequently becoming the study of diverse legal subjects who inhabit the law. Jurisprudence is becoming a multicultural study of rich and diverse theoretical discourses. The new interest in forms of legal discourse has started a transformative process in jurisprudence that has broken down the barriers that separate law from culture and jurisprudence from its interpreting subjects. Identity politics of multicultural legal criticism<sup>81</sup> encourages contemporary legal scholars to be more sensitive to the differences between groups and individuals in society. This new sensitivity to the difference of "others" (other cultures, genders, races, socioeconomic classes, etc.) has opened the door to a new form of legal criticism which many now regard as postmodern. Postmodern legal criticism arises from the efforts of legal scholars experimenting with alternative and different notions of subjectivity. In bringing attention to alternative and different notions of subjectivity, postmodernists question the identity of the subjects and the author of the law. It is in this critical dimension that postmodern legal criticism provokes new questions about the relation between law, culture, and politics.

#### III. POSTMODERN LEGAL MOVEMENTS

In law, the contours of postmodern criticism are currently shaped by two dominant intellectual perspectives. One group of postmodern legal critics has adopted a *neopragmatic* stance framed by the antifoundational philosophy of Richard Rorty.<sup>82</sup> The

<sup>80.</sup> See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1990).

<sup>81.</sup> See POSTMODERN LEGAL MOVEMENTS, supra note 1, at ch. 10.

<sup>82.</sup> See RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, supra note 61. Rorty defines pragmatism as an "attempt to replace the notion of true beliefs as representations of 'the nature of things' and instead to think of them as successful rules for action." RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS 65 (1991) [hereinafter PHILOSOPHICAL PAPERS].

Neopragmatists adopt postmodern strategies when they are confronted with doubts and predicaments about the modernist's framework. They attempt to explain how one can do theoretical work without rejecting all pretenses of foundational knowledge. The goal of these postmodern critics is freedom from theory. See Peter C. Schanck, Understanding Postmodern Thought and its Implications for Statutory Interpretation, 65 S. CAL. L. REV. 2505, 2514 (1992). Schanck identifies postmodern legal thought with neopragmatism. As Schanck has

neopragmatic stance, which I tentatively identify as a "postmodern pragmatist" strategy, asserts that theoretical speculation has proceeded under the false assumption that knowledge exists and is discoverable. Postmodern pragmatists argue that "there's no there there." Postmodern pragmatists tend to argue that it would be better if we gave up on the search for truth and instead concerned ourselves with the more mundane task of comprehending how knowledge, power, and society function within particular communities and societies.

When applied to legal studies, postmodern pragmatism helps to identify the academic mood of scholars who reject foundational claims of legal theory but remain committed to the view that the empirical method can be useful for resolving legal problems. For postmodern pragmatists, theory is a tool that can be used for helping decision-makers resolve problems pragmatically. Neopragmatists thus believe in and are committed to the Enlightenment idea of progress. For this reason, neopragmatism may only be a "close cousin" of postmodernism.<sup>84</sup>

explained: "The second strain (of postmodernism), neopragmatism, agrees with poststructuralism that language mediates our understanding of the world and that we lack the ability to grasp reality 'as it really is,' but neopragmatism emphasizes the social construction of knowledge and language." *Id.* (citing RICHARD RORTY, CONSEQUENCES OF PRAGMATISM *xix-xx* (1982)).

83. Neopragmatists such as Rorty have attempted to go beyond the old pragmatism by taking the instrumental and scientific-oriented philosophy of Peirce, James, and Dewey and reformulating it as a form of conversation or "linguistic enterprise." PROMISE OF PRAGMATISM, *supra* note 32, at 3. Diggins notes that Rorty has been criticized for doing this even though at least one early pragmatist thinker, John Dewey, was himself "sympathetic to literature and its ambitions to understand the world as well as write about it." PROMISE OF PRAGMATISM, *supra* note 32, at 3.

The unique feature of neopragmatism is that it attempts to locate pragmatism within an anti-foundational perspective and adopts a linguistic orientation that attempts to explain the meaning of things in terms of conversation. Whereas early pragmatists advocated the role of intuition and experience as their method, neopragmatists have turned to "[r]hetoric, conversation, narration, and discourse . . . [as their] means of coping in the modern world." PROMISE OF PRAGMATISM, supra note 32, at 3. Following the ideas of Wittgenstein, Dewey and Heidegger, Rorty argues that "investigations of the foundations of knowledge or morality or language or society may be simply apologetics, attempts to eternalize a certain contemporary language-game, social practice, or self-image." RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, supra note 61, at 9-10. Rorty believes that the representational systems of meaning used in philosophical discourse derive meaning from social practices and conventions of society. "[N]othing counts as justification unless by reference to what we already accept, and . . . there is no way to get outside our beliefs and our language so as to find some test other than coherence." RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, supra note 61, at 178. Rorty's neopragmatism, coupled with his insistence that the meaning of things are embedded in social and historical practices, is "quintessentially postmodern." JOHN McGowan, PostmodernISM and ITS CRITICS 192 (1991). And, yet, postmodernism and neopragmatism, though they overlap, are not homogeneous. The critical discourse of postmodernism emphasizes radical rapture and discontinuity between modernism and its ideals, whereas neopragmatists such as Rorty seem to advocate that a new pragmatic form of knowledge (one without foundations) may rescue modernism from its dilemmas by rendering it capable of accomplishing its ideals. Neopragmatists appear more cheerful and idealistic than their more sober and worrisome postmodern counterparts. See infra note 84.

84. Labelling neopragmatism as postmodern is indeed controversial. In fact, neopragmatists tend to

The other postmodern strategy, which I have labelled as "ironist legal criticism," is more radical. It focuses on how theoretical views about coherence, consistency, and empirical verifiability are structured by a normatively charged vocabulary and grammar of a particular culture. In bringing attention to the flaws, weaknesses, and failures of this vocabulary and grammar, these postmodern critics hope to expose how language reinforces particular perspectives and establishes the power and dominance of certain cultures. These postmodernists thus attempt to displace, decenter, and weaken the modernists' conception of law.

Ironist legal critics are *ironists* because they claim that the discourse of Western thought has been very effective, but not for the reason modernists imagine. Ironists assert that the significance of modernism lies not in specific prescriptions or the accomplishment of particular social tasks; rather, it lies in the intellectual pursuit of theory as an end to itself. In philosophy, modernism is said to have become "more important for the pursuit of private perfection rather than for any social task." In law, modernism is said to have established a form of normative legal thought which is "so concerned with producing

avoid the postmodern label. Neopragmatism is like postmodernism in that its practitioners accept the postmodern view that truth and knowledge are culturally and linguistically conditioned. See Schanck, supra note 82, at 2515. Neopragmatist practice is unlike postmodern in that neopragmatism is less concerned with exposing the contradictions of modern conceptual and normative thought than revealing instrumental, empirical or epistemological solutions for the problem at hand. See also Margaret J. Radin & Frank Michelman, Pragmatist and Poststructuralist Critical Legal Practices, 139 U. PA. L. REV. 1019, 1031-32 (1991).

- 85. See POSTMODERN LEGAL MOVEMENTS, supra note 1, ch. 12. My use of the label *ironist* is drawn from Richard Rorty's notion of *ironist theorist* in RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 73 (1989). According to Rorty, an *ironist* is someone who fulfills three conditions:
  - "(1) She has radical and continuing doubts about the final vocabulary she currently uses, because she has been impressed by other vocabularies, vocabularies taken as final by people or books she has encountered; (2) she realizes that argument phrased in her present vocabulary can neither underwrite nor dissolve these doubts; (3) insofar as she philosophizes about her situation, she does not think that her vocabulary is closer to reality than others, that it is in touch with a power not herself."
- Id. An ironist who is "inclined to philosophize see[s] the choice between vocabularies as made neither within a neutral and universal metavocabulary nor by an attempt to fight one's way past appearances to the real, but simply by playing the new off against the old." Id. Rorty ironically calls himself an ironist theorist, but the irony is that his brand of neopragmatic philosophy has been used by pragmatic critics to sustain the usefulness of the modernist framework and vocabulary.

Other commentators use the term *poststructuralism* to distinguish this separate strand of postmodern thought from neopragmatism. *See* Schanck, *supra* note 82, at 2514; Radin & Michelman, *supra* note 84, at 1031-32. Postmoderns, however, disagree about whether the poststructuralism is a modernist or postmodernist concept; and, therefore, there is reason to doubt whether neopragmatism is a postmodern strategy. *See* ANDREAS HUYSSEN, AFTER THE GREAT DIVIDE: MODERNISM, MASS CULTURE, POSTMODERNISM 207-16 (1986) (claiming that poststructuralism is a modernist concept). *See also* Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 304 n.221 (1993).

86. RORTY, CONTINGENCY, IRONY, AND SOLIDARITY, supra note 85, at 94.

normatively desirable worldly effects [it] has, ironically, become its own self-referential end."87

Ironists attempt to "intensify the irony" of modern discourse by exposing how the descriptions and prescriptions of the discourse fail to support the objective truth claims that the theorists make for advancing social progress. Ironists argue that the modernist framework for theoretical and practical discourse fails to have worldly effects and that such "effects" represent the hidden power of the modernists' normative projects. Postmodernists such as Jacques Derrida, Michael Foucault, and Edward Said thus employ techniques for displacing and decentering the modes, categories, and normative concepts of Western thought in order to bring out the irony and paradox of modernist culture.

## A. The Two Sides of Postmodern Legal Criticism

Postmodern legal criticism can be found in the work of contemporary legal scholars who have adopted either the *postmodern pragmatist* or *ironist* stance to offer an alternative to legal modernism. Richard A. Posner, the founding father of the conservative legal movement known as the law and economics movement, <sup>91</sup> is becoming one of the best known pragmatic legal scholars in the academy today. Pierre Schlag, a second-generation critical legal studies <sup>92</sup> scholar, is the leading champion of ironist legal criticism. The current position of postmodern legal criticism can be discerned by examining the jurisprudential views of these two important and influential legal scholars.

1. Posner.—I admit that one does not usually think of Richard A. Posner as a postmodernist. Posner himself would, in fact, most likely object to being associated with postmodernism. Yet, undeniably, Posner's recent work in jurisprudence has an unwittingly postmodern character to it: his articles and books in jurisprudence are a pastiche of grand philosophical luminaries cited in the most traditional legal form combined with a nostalgic, almost religious, yearning for common-sense reasoning, held together by neopragmatic philosophy. This philosophy is advertised as a long-lost "Holmesian tradition," a tradition that makes Holmes the first pragmatic legal thinker in America. The postmodern movements in Posner's recent jurisprudential writing can be detected in his effort to "overcome" the silences, ambiguities, and schisms of modern legal thought.

Postmodern pragmatism is evident in Richard A. Posner's *Pragmatic Manifesto* initially outlined in his 1990 book *The Problems of Jurisprudence*. <sup>95</sup> In this book, Posner

<sup>87.</sup> See Pierre Schlag, Normative and Nowhere to Go, 43 STAN. L. REV. 167, 186 (1990) [hereinafter Normative and Nowhere to Go].

<sup>88.</sup> See, e.g., JACQUES DERRIDA, OF GRAMMATOLOGY (1976).

<sup>89.</sup> See, e.g., MICHAEL FOUCAULT, POWER/KNOWLEDGE (1980).

<sup>90.</sup> See, e.g., EDWARD W. SAID, CULTURE AND IMPERIALISM (1993).

<sup>91.</sup> See supra notes 63-65 and accompanying text.

<sup>92.</sup> See supra notes 66-68 and accompanying text.

<sup>93.</sup> See RICHARD A. POSNER, OVERCOMING LAW 317 (1995) ("I would not describe myself as a postmodernist thinker.").

<sup>94.</sup> I am indebted to Pierre Schlag for this point.

<sup>95.</sup> POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 3, at 454-69.

renounced both the economic formalism of the law and economics movement and the deconstruction practice of the left and embraced, instead, a pragmatic alternative. According to Posner, pragmatism overcomes the predicament of modern conceptual and normative jurisprudence without falling prey to the moral relativism of legal realism or its modern counterpart—critical legal studies. Posner's pragmatic alternative is portrayed as maintaining "a middle ground between formalism and realism in American jurisprudence."

Posner is willing to embrace the formalism of economic analysis because it is, unlike Langdellian formalism, "empirically verifiable." As for legal realism and its modern counterpart, critical legal studies, Posner asserts that these movements in law eventually succumb to the dangers of moral relativism because they fail to provide practical guidance to lawyers and judges. Instead of relying on formalistic logic or abstract theory, Posner seemingly adopts the modernist view and argues that judges should use theory and legal reasoning as a tool to get a job done.

According to Posner's view of jurisprudence, legal reasoning should be practical and instrumental, not formalistic or political. In his view, the merit of every legal analytic must be tested by asking whether it "works" instrumentally in maximizing human goals and aspirations. Posner justifies the application of economics to law on a practical level: economics wins because it "gets the job done" better than any other method. Posner's message in *The Problems of Jurisprudence* is that lawyers and judges should take a more practical and relaxed look at things; they should give up on the search for logical perfection and instead concern themselves with figuring out how they can better attain socially useful goals. Posner thus argues that legal theorists should employ empirical methods in their work.

Posner's pragmatism exhibits what Thomas Grey calls "freedom from theoryguilt," <sup>101</sup> a scholarly temperament liberated from the necessity of devising a theory of law rooted in some total perspective. <sup>102</sup> Freedom from theory-guilt places pragmatists in a theoretical position that is critical of modern legal theory as well as the interdisciplinary theories associated with the 1980s movements in legal studies. Grey believes that the liberation of freedom from theory-guilt enables these legal critics to avoid the logical paradoxes posed by the contradictory views of "perspectivist self-reference" (there are no universal truths) and "perspectivist dogmatism" (my truth is the *real* truth), which characterize the view of modern legal theory as well as critical social theories such as Marxism. <sup>103</sup>

<sup>96.</sup> Neil Duxbury, Pragmatism without Politics, 55 MOD. L. REV. 594, 596 (1992).

<sup>97.</sup> POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 362. Hence, "[t]he difference between the economic analysis of law and Langdellian legal science, Posner insists, is that the former is 'empirically verifiable.'" Duxbury, *Pragmatism without Politics*, *supra* note 96.

<sup>98.</sup> POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 3, at 154-56, 255-59.

<sup>99.</sup> POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 3, at 460.

<sup>100.</sup> POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 3, at 460.

<sup>101.</sup> Thomas C. Grey, Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory, 63 S. CAL. L. REV. 1569, 1569 (1990).

<sup>102.</sup> Id. at 1576-77.

<sup>103.</sup> Id.

In *The Problems of Jurisprudence*, Posner attempts to show how the history of modern legal thought has been plagued since its inception by predicament and paradox. The book, as the English legal theorist Neil Duxbury noted, "turns out to be an attempt to take just about every theory that has traditionally occupied the minds of American legal philosophers and demonstrate that the problem, in each case, is that there is somehow something missing; to demonstrate, in short, that every theory has its stumbling block." <sup>104</sup> In Posner's view, modern legal thought represents a series of felt absences or gaps that have never been fully explained nor resolved (*e.g.*, the problem of maintaining the belief in autonomous law, the problem of defending a concept of law without ideology, the problem of knowledge without truth, etc.).

Instead of attempting to offer a new theoretical approach for resolving the puzzles of modern legal thought, Posner has adopted the characteristic postmodern strategy of simply refusing to engage in further "theory talk." Posner thus turns to Rorty's brand of neopragmatism as an alternative to theoretical speculation, arguing that legal theorists should turn away from the goal of perfecting legal theory and instead focus their attention on empirical practice and experimentation. Posner's pragmatic message is that students and scholars should study not what the lawyers and judges know, but what they do. He essentially has put his intellectual talents to the task of overcoming the problems of jurisprudence by advocating the postmodern alternative of neopragmatism.

Neopragmatists, like contemporary postmodernists, are prone to declare that modern theoretical studies have reached a "dead end" (hence, like all postmodernists, they are known to utter the now-famous characteristic "end of history" pronouncement). Having declared theoretical knowledge of philosophy or law to be at an "end," neopragmatists assert that we should now go beyond modernism and re-examine the way theoretical knowledge actually functions in society. The purpose of this declaration is to bring attention to the contingent nature of truth and to reveal how foundational knowledges are the product of socially constructed beliefs and practices.

Thus, Posner concludes in *The Problems of Jurisprudence* that we can "improve our understanding of law" by "letting pragmatism emerge as the natural alternative" to cure the problems of jurisprudence. The "fundamental problem of jurisprudence is jurisprudence;" and, Posner's reaction to that problem is to acknowledge it, embrace it, and then move on to more practical matters. In *The Problems of Jurisprudence*, the problem is recognized; and, the alternative, Posner's pragmatic manifesto, is identified.

<sup>104.</sup> Duxbury, Pragmatism Without Politics, supra note 96, at 608.

OF JURISPRUDENCE, supra note 3, at 27, 67, 384-87, 464-65. Richard Rorty, for example, advocates looking at philosophy and history as a conversation situated in a particular culture and society. By looking at philosophy and history in this way, Rorty seeks to learn how theoretical beliefs and dogmas come to be formed and how those beliefs reflect impartial and sometimes incorrect views of the world. See RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, supra note 61, at 389 ("If we see knowing not as having an essence, to be described by scientists or philosophers, but rather as a right, by current standards, to believe, then we are well on the way to seeing conversation as the ultimate context within which knowledge is to be understood.").

<sup>106.</sup> POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 3, at 163, 225.

<sup>107.</sup> Duxbury, Pragmatism without Politics, supra note 96, at 610.

In Posner's more recent book, *Overcoming Law*, <sup>108</sup> Posner takes the next postmodern step in declaring that it is time to move beyond modernism.

As the title suggests, Posner's Overcoming Law seeks to overcome the problems of modern jurisprudence by adopting a basic postmodern avoidance strategy. In Posner's view, it is time that legal theorists give up on the projects of legal modernism and accept the impossibility of discovering settled solutions to legal problems. While he expressly disassociates himself from the form of postmodernism that practices deconstruction interpretation, <sup>109</sup> Posner unwittingly sets out in Overcoming Law to develop the political argument in favor of a distinctively postmodern brand of pragmatism. His basic thesis is that pragmatism can be understood as consistent with the political ideology of conservative liberalism informing his early law and economics writing. <sup>110</sup>

Posner also finds inspiration for his pragmatism in none other than Oliver Wendell Holmes. Posner's Holmes is not, however, the same Holmes that inspired the legal realists or modern day instrumentalists. Posner's Holmes is decidedly more pragmatic and *almost* postmodern. Posner argues that Holmes was the first legal pragmatist in the academy to recognize that we must overcome the doubts and tensions of modern legal theory. In *Overcoming Law*, Posner paints a picture of Holmes as a Nietzschean who believed that all "meaning is social rather than immanent." Posner finds within Holmesian thought a form of skepticism that is wedded to the enterprise of neopragmatic philosophers such as Richard Rorty. Posner thus proclaims Holmes as inspiration for his pragmatic manifesto, and he finds within Holmes's jurisprudence the inspiration to move beyond legal modernism.

What has impressed Posner about Holmes is that he "could doubt the foundation of any objective reality and still value common sense as an act of intellectual modesty." Holmes argued that the meaning of law as well as the nature of truth is contingent upon events, competition, and historical context. Holmes downplayed theoretical speculation about the law in his academic writing because his focus was aimed at shifting legal thought from theory to practice. Thus, Holmes argued that "[t]he object of our study . . . is prediction, the prediction of the incidence of the public force through the

<sup>108.</sup> POSNER, OVERCOMING LAW, supra note 93.

<sup>109.</sup> Posner, Overcoming Law, *supra* note 93, at 317 ("I would not describe myself as a postmodernist thinker. Postmodernism is the excess of pragmatism. They [postmodernists] are not merely antimetaphysical, which is fine, but also antitheoretical. Almost all of them are infected by the virus of political correctness, as well. And, though with notable exceptions, they write in an ugly, impenetrable jargon, sometimes with the excuse that to write clearly is to buy into Enlightenment mythology of unmediated communication between author and reader.").

<sup>110.</sup> POSNER, OVERCOMING LAW, *supra* note 93, at 29 ("[L]iberalism and pragmatism fit well with each other and, as we saw earlier, with economics. The fusion can transform legal theory. This at least is the thesis of this book.").

<sup>111.</sup> POSNER, OVERCOMING LAW, supra note 93, at 13-14.

<sup>112.</sup> POSNER, OVERCOMING LAW, *supra* note 93, at 390. *See also* POSNER, THE PROBLEM OF JURISPRUDENCE, *supra* note 3, at 239-44.

<sup>113.</sup> PROMISE OF PRAGMATISM, supra note 32, at 350.

<sup>114.</sup> See PROMISE OF PRAGMATISM, supra note 32, at 350-51 (describing Holmes's "genius" in [shifting] legal thought from theory to practice").

instrumentality of the courts."<sup>115</sup> Holmes's response to Langdell was one of avoidance; he simply moved away from Langdellian formalism toward a different approach.<sup>116</sup>

Posner has discovered in the vast writings of Holmes the traces of postmodernism—the "sensing [of] the dead end of all theoretical speculation." Holmes's skeptical form of practical reason emancipates contemporary legal theorists like Posner from questioning the meaning of law deduced from abstract concepts and formal texts. For Holmes, the meaning of law remained hidden within an on-going cultural struggle about knowledge, truth, acceptance, and belief. Holmes believed that "truth" evolves from struggle and acceptance. Holmes rejected the modernist urge to "solve" the problem of "truth" once and for all. Posner accepts this Holmesian insight about truth and discovers within it a postmodern strategy. Like Holmes, Posner believes that pure theoretical speculation in the law leads nowhere.

For Posner, Holmes was the first serious legal scholar to attempt to overcome the predicaments of legal modernism. Holmes's success was in getting legal thinkers to shift their attention from Langdell's theory of "law as a science" to the empirical and practical study of "law as prediction." This shift was possible because Holmes was able to show how one might overcome the pitfalls of theoretical speculation in the law. Holmes was able to do this because he was a natural skeptic; he distrusted the foundational claims of the Langdellians who believed that legal meaning could be deduced from an objective reality.

Posner finds within Holmesian thought the inspiration to be skeptical about the foundational claims of modern legal scholars who purport to deduce legal meaning from legal texts. Posner wants to overcome the urge to fix the meaning of law in some objective reality. He wants to overcome the modernist impulses of those legal thinkers who believe that the law is an autonomous object. In *Overcoming Law*, <sup>120</sup> Posner aspires to overcome, once and for all, the limitations and pitfalls of the legal modernists'

<sup>115.</sup> Holmes, The Path of the Law, supra note 41, at 457.

<sup>116. &</sup>quot;Whereas, for Langdell, everything about the law could be fitted between the covers of a book, Holmes introduced a totally new element into the jurisprudential framework: namely people." PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 38.

<sup>117.</sup> PROMISE OF PRAGMATISM, supra note 32, at 350.

<sup>118.</sup> As Patrick Diggins has recently put it: "Holmes was a precursor of postmodernism in sensing the dead end of all theoretical speculation. Somehow he could doubt the foundation of any objective reality and still value common sense as an act of intellectual modesty." PROMISE OF PRAGMATISM, *supra* note 32, at 350.

<sup>119.</sup> The simple Holmesian pronouncement, "[t]he life of the law has not been logic; it has been experience," supra note 36 and accompanying text, expresses the glimmer of a postmodern insight. This insight can be discovered in the view of postmodernists who associate knowledge, truth and power with the system of communications and societal practices of different cultural communities. As one recent commentator has put it: "No body of knowledge can be formed without a system of communications, records, accumulation and displacement which is in itself a form of power and which is linked, in its existence and functioning, to the other forms of power... There is not knowledge on the one side and society on the other, or science and the state, but only the fundamental forms of knowledge/power." Steven Connor, Postmodernist Culture: An Introduction to Theories of the Contemporary 11 (1989) (quoting Alan Sheridan, Michel Foucault: The Will to Truth 131 (1980)).

<sup>120.</sup> See POSNER, OVERCOMING LAW, supra note 93.

theoretical search for legal truth in the formal texts of the law that purport to inscribe the meaning of law.

It is also true, however, that Posner's brand of pragmatism is *not quite* postmodern. It ultimately falls back on an ideology, even though this is something that Posner seemingly attempts to overcome. Posner's *Overcoming Law* clings to a political ideology—the classic liberalism of John Stuart Mill—that is very much part of the aesthetics and style of the type of legal thought he seeks to transcend with his pragmatic manifesto.<sup>121</sup> The classical theory of liberalism, which Posner wishes to defend pragmatically, is committed to the modernists' definition of law.

The classical liberal is the person who believes in tolerance and diversity but also believes that the state must remain neutral on substantive choices of the individual. This liberal person assumes that a "large sphere of inviolate private activity" can be located for "personal liberty and economic prosperity." Classical liberalism attempts to develop its understanding of the legal concept of liberty based on knowledge about some universal reasonable person living in the pristine world of the private sphere. Mill and his followers assumed that a universal definition of liberty could be developed to inaugurate a more liberal and autonomous legal system. 123

In Overcoming Law, Posner wants to do to law what Mill did to utilitarianism: render it more pragmatic and more useful.<sup>124</sup> But, to do this, Posner must reject the modernist's urge to locate the foundational essence of legal rights, such as liberty, which Mill never questioned. Ironically, in following the footsteps of Mill, Posner is led back to the very legal essences he labors to "overcome."

Contemporary pragmatic thinkers such as Richard Rorty have moved beyond liberalism because they regard it as being caught up in the belief that "man has an essence—namely, to discover essences." Posner's pragmatic orientation rejects the search for essences on one level, but his political commitment to the views of John Stuart Mill (and Adam Smith) recommits him to the modernist idea that the essences of the world can be discovered by adopting the master-vocabulary of liberalism and the laboratory orientation of the natural scientist. Liberalism, in its modern legal form, must

<sup>121.</sup> See, e.g., POSNER, OVERCOMING LAW, supra note 93, at 23-24. "I take my stand with John Stuart Mill of On Liberty (1859), the classic statement of classic liberalism." POSNER, OVERCOMING LAW, supra note 93, at 23.

<sup>122.</sup> POSNER, OVERCOMING LAW, supra note 93, at 24.

<sup>123.</sup> In modern law, this view is associated with the idea that the legal system must treat every person as an equal, or, as Posner has put it: "[E]very person [must be] entitled to the maximum liberty—both personal and economic—consistent with the liberty of every other person in the society." POSNER, OVERCOMING LAW, supra note 93, at 23. (citing JOHN STUART MILL, ON LIBERTY (1859)).

<sup>124.</sup> Richard Rorty notes how pragmatists thought of themselves as following the footsteps of Mill in "making [utilitarianism] something you could use instead of something you could merely respect, something continuous with common sense instead of something which might be as remote from common sense as the Mind of God." RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, *supra* note 61, at 308. It would seem, then, that Posner wants to do to law what Mill did to philosophical utilitarianism; that is, to make law capable of *doing* things instead of being something that is merely respected and obeyed.

<sup>125.</sup> See RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, supra note 61, at 357.

be overcome if Posner is to overcome law; but, this, Posner is reluctant to do because he remains trapped by an external conservative philosophy and orientation.

2. Schlag.—Unlike neopragmatists, ironists reject the idea of a "middle ground" of a pragmatic intuition for avoiding the essentialism of foundation theories and perspectives. They believe that there is no way to avoid the predicaments of modern theory because no "middle ground" exists. These non-pragmatic postmoderns have given up on the Enlightenment idea of theory altogether; they strive to look beyond theory to discover the normative narratives and discourses of law. Ironist legal criticism presents a different way of reacting to legal modernism. It may be considered an attempt to comprehend the predicament of legal modernism by comprehending how beliefs and meaning come to justify and personify the interests and mindset of modern bureaucratic officials.

One way to understand the critical stance of ironists is to consider how they position themselves in relation to neopragmatists such as Posner. While neopragmatists reject the "centered" foundation of modern legal theory, they believe that intuition and practical reason can situate the pragmatic theorist and enable her to develop an instrumental way of knowing what to do. Ironists claim that the situatedness and instrumentalism of neopragmatism is merely another manifestation of the modernists' attempt to discover a foundation for legal analysis. One of the leading ironist critics in the legal academy today, Pierre Schlag, 126 concludes that "[n]eopragmatism . . . remains a protest against philosophical idealism, rationalism, and transcendentalism that ironically remains confined to the realms, the matrices already carved in the self-images of philosophical idealism, rationalism, and transcendentalism." Hence, Schlag argues that neopragmatism is *prefigured* by its own foundation. 128

Neopragmatism's foundation is the intuition and common sense of the situated pragmatist. Ironists attempt to decenter the foundation of neopragmatism by revealing how pragmatic judgment reflects the view of a situated subject who tries to be very pragmatic in reacting to the postmodern condition. As Schlag has amusingly put it: "The pragmatist subject, understood in pragmatic terms, is the shopper at the universal mall making meaning with the commodified signs of our traditions and culture while the social aesthetics of techno-bureaucratic strategies are making him think he means something. Everything else is just nostalgia." <sup>129</sup>

Rosemary Coombs, Drucilla Cornell, Steven L. Winter, David Kennedy, Gerald Frug, Mary Joe Frug, and Nathaniel Berman. See Rosemary Coombs, "Same As It Ever Was": Rethinking the Politics of Legal Interpretation, 34 McGill L.J. 603 (1989); Drucilla L. Cornell, Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation, 136 U. Pa. L. Rev. 1135 (1988); Winter, supra note 27; David Kennedy, Spring Break, 63 Tex. L. Rev. 1377 (1990); Kennedy, supra note 66; Jerry Frug, Decentering Centralization, supra note 85; Mary Joe Frug, Postmodern Legal Feminism (1992); Nathaniel Berman, "But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law, 106 Harv. L. Rev. 1792 (1993).

<sup>127.</sup> Pierre Schlag, The Problem of the Subject, 69 TEX. L. REV. 1627, 1721 (1991).

<sup>128.</sup> See Pierre Schlag, Pre-Figuration and Evaluation, 80 CAL. L. REV. 965 (1992). Pre-figuration is the "reflexive" bias embedded within all theoretical perspectives.

<sup>129.</sup> Schlag, The Problem of the Subject, supra note 127, at 1721.

Schlag's postmodern strategy sets out to reveal the identity of the legal subjects of modernists and pragmatists who have largely remained missing in the contemporary discussions of law. Schlag has illustrated how this problem—the problem of the subject—is exemplified in the writing of Langdell. Schlag argues that this problem of the missing subject can be discovered in the way Langdell wrote about the law. When discussing the law of contracts in his casebook, Langdell became a passive observer. Schlag thus observes how Chris Langdell, the author of the casebook, is absent from the discussion of legal doctrine, but is briefly present in his discussion of pedagogy in the preface. As Schlag explained: "[W]henever Chris addresses a matter of pedagogy in his preface, the *I* is all over the place. And yet, quite mysteriously, as soon as the law makes its appearance in the preface, the *I* vanishes. Chris disappears. Dean Langdell is removed."

Indeed, Langdell wrote as if the legal rules of contract law "stand alone, [as] self-sufficient, self-sustaining systems." Contract law does things; the rules speak, the doctrine evolves and develops. The author, Langdell, who was the analyzing subject and in reality the maker and interpreter of the casebook, is removed from the discussion. The problem is that the individual creating the law, the person creating the discourse of the text, is removed from the discussion. Modern legal scholars have since followed Langdell's example; accounts of the subject are rare in contemporary legal scholarship because subjectivity is subliminated in legal forms and because only certain kinds of subjects can be vested in these legal forms.

Only recently have contemporary legal critics recognized that the missing subject in modern legal thought *is* a problem.<sup>133</sup> The problem of the subject poses three distinct dilemmas for legal modernists.<sup>134</sup> The first dilemma concerns the tendency of legal theorist to ignore who or what it is that thinks or produces law. The second concerns the task of transcending the rhetoric or discourse that prevents legal scholars from confronting the problem; and, the third concerns the problem of accounting for the subject-in-control of the law. These three related dilemmas have posed serious predicaments for contemporary legal scholars.

The first dilemma, the belief in an autonomous analyzing subject standing outside of law, was reflected by Langdell's iconoclastic vision of "law as a science." It was Langdell's vision of law as a legal science that encouraged modern legal academics to write in the passive voice and to rigorously maintain the detached demeanor of a scientist conducting a controlled experiment. Modern legal scholars experience the law as being somehow "constrained" and "bounded" by law's professional method of analysis and orientation. And, yet, in removing *their* subjective presence from their discussion of the

<sup>130.</sup> This point is more fully developed in Schlag, *The Problem of the Subject, supra* note 127. *See also* David S. Caudill, *Pierre Schlag's "The Problem of The Subject": Law's Need for an Analyst*, 15 CARDOZO L. REV. 707 (1993).

<sup>131.</sup> Schlag, The Problem of the Subject, supra note 127, at 1633 (emphasis added).

<sup>132.</sup> Schlag, The Problem of the Subject, supra note 127, at 1640.

<sup>133.</sup> Pierre Schlag was the first to identify the problem of the subject. See Schlag, The Problem of the Subject, supra note 127.

<sup>134. &</sup>quot;The problem of the subject is not a single problem, but three distinct problems." Caudill, *supra* note 130, at 709.

law, modern legal scholars have also assumed that they are capable of excluding their own personal subjective identities from their work. Modern legal thinkers assume, in other words, that they are capable of becoming relatively empty, abstract, and universal subjects-in-control of the law. Hence, the expression "thinking like a lawyer" makes sense because it is thought that all lawyers think alike.<sup>135</sup>

The second dilemma concerns how the rhetorical form of legal reasoning makes it difficult for legal subjects to inquire into the hidden assumption of the autonomous subject. One aspect of this problem involves the objectification of law—legal rules are explained, analyzed, and criticized as if they were transcendental objects unaffected by analyzing subjects. In Langdell's contracts casebook, for example, the law is a transcendental object unaffected by social and economic context. [136] "[A] debtor becomes personally bound to his creditor for the payment of the debt . . . ." The debtor and the creditor are unnamed individuals who are the legal abstractions of Langdell's analysis of commercial law.

Langdell, the interpreter of the law, never let the reader know that it was he, rather than the "law," that created the discourse and conducted the analysis. <sup>138</sup> In contemporary jurisprudence, this way of talking and thinking about the law is recognized as the "formal style" of conceptual legal thought otherwise known as "legal formalism." Conceptualists who are formalists believe that law should be justified on the basis of uncontroversial rules and abstract doctrinal formulations insulated from external moral and ethical concerns. <sup>139</sup> Formalism in law has become a popular mode of legal rhetoric that has prevented legal scholars from confronting the hidden assumption of the autonomous legal subject.

A variant of this occurs when the analyzing subject becomes subordinated to the law as a "transcendental subject." Langdell's discussion of contract law, for example, also proceeded as if law itself was speaking to the reader and hence capable of creating its own meaning. "The law, like a subject, [did] things; doctrines [became] subjects, and [did] things to each other." The rhetoric of transcendental subject, like that of the transcendental object, has enabled modern legal scholars to avoid the problem of the

<sup>135.</sup> See Pierre Schlag, Clerks in the Maze, 91 MICH. L. REV. 2053 (1993). In the discursive world of the law, "the *identity* and the *ontological status* of the main terms and the main grammar are at once almost always beyond question, and yet almost always dramatically underspecified." *Id.* at 2069.

<sup>136.</sup> See Schlag, The Problem of the Subject, supra note 127, at 1632-62.

<sup>137.</sup> Christopher C. Langdell, A Brief Survey of Equity Jurisdiction, 1 HARV. L. REV. 55, 68 (1887) (quoted in Schlag, The Problem of the Subject, supra note 127, at 1632).

<sup>138.</sup> As Schlag put it: "Langdell's work reads like law's immaculate conception." Schlag, *The Problem of the Subject, supra* note 127, at 1632.

<sup>139.</sup> See Pierre Schlag, Normativity and the Politics of Form, 139 U. PA. L. REV. 801, 814-28 (1991); Grey, Langdell's Orthodoxy, supra note 23, at 9. Non-formalists who remain conceptualists want clear autonomous rules, but they place little importance on more abstract doctrinal formulations. They believe, as Holmes believed, that "[g]eneral propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). See also Grey, Langdell's Orthodoxy, supra note 23, at 9 n.29.

<sup>140.</sup> See Schlag, The Problem of The Subject, supra note 127, at 1646; Caudill, supra note 130, at 711.

<sup>141.</sup> Caudill, supra note 130, at 711. See also Schlag, The Problem of the Subject, supra note 127, at 1647.

subject. The rationalist artifice of law as the autonomous subject raises the perplexing question of where the boundaries (if any) of law are located, and whether this system can even be adequately conceptualized as having a determinant inside and outside.

Legal formalists who follow Langdell's orthodoxy assume that law is either a transcendental object or a subject possessing universal properties unaffected by interpreting subjects. Formalists thus project a particular interpretive stance onto the object of their contemplation, based upon a highly abstract mode of logical analysis taken out of context. Under Langdell's view, a contract for the sale of groceries is like all other contracts, because all contracts worthy of legal enforcement must satisfy certain universal rules established by an objective theory of contract law. "A contracts with B" became the universal mode for analyzing contracts for the sale of groceries as well as contracts for employment. Langdellian formalism portrayed law as a grounded, self-defining, foundationally secure, and bounded "object" capable of being discovered by legal subjects. 143

The third dilemma arises once it is realized that the subject is a problem. Once the subject is revealed and articulated, legal scholars are confronted with a serious predicament. There are many different subjects who interpret the law; and, their identity is constructed from different cultural contexts, traditions, and gender and racial perspectives. This, in turn, raises the predicament of modern law; namely, the problem of justifying the ideal of a universal "Rule of Law" in a multicultural world. If the meaning of law depends on the various constructions of different subjects, then "law" remains problematized by the identity of the subjects-in-control of the law. Therein lies one predicament of legal modernism: since law is man-made, the meaning of law can only be indeterminate given the diverse theories and practices of speaking, writing, and acting. But, the indeterminacy at the heart of the law calls for inquiry into the diverse identity of the subjects-in-control of the law. This inquiry can be threatening and, indeed, frightening to many contemporary legal thinkers because it potentially exposes how legal codes, texts, professional habits, and grammar constitute subjectivity in the law.

Ironist legal criticism is thus informed by the awareness that the subject is a problem for legal modernists. "The problem arises as each school [of jurisprudence] recognizes that its own intellectual architecture, its own normative ambitions rest upon the presupposition of a subject—a subject whose epistemic, ontological, and normative status is now very much in question." The political action of postmodern ironist criticism is to highlight the decenteredness of the subject so that the human agent of law can appreciate her precarious situation within a discourse of law whose identity and actions are not what they are (re)presented to be. For ironists, "the humanist individual subject has now become one of the main disciplinary vehicles by which bureaucratic institutions stylize, construct, organize and police their clientele." 145

<sup>142.</sup> See Grant Gilmore, The Death of Contract, 43-44 (1974).

<sup>143.</sup> See Schlag, The Problem of the Subject, supra note 127, at 1632-56.

<sup>144.</sup> Schlag, The Problem of the Subject, supra note 127, at 1738.

<sup>145.</sup> Normative and Nowhere to Go, supra note 87, at 173.

Ironists view the politics of postmodernism as the "politics of the form." The "politics of the form" refers to the way representational practice in modern legal thought reproduces and defines the "political and jurisprudential field" that shapes the identity of legal subjects.

Ironists maintain that this representational practice has produced a form of legal normativity that has prevented legal subjects from appreciating how law limits their imagination and action. The political action of Pierre Schlag's ironist criticism attempts to produce an awakening in the human agents of law so that they might become more aware of the unstable and duplicitous nature of the discourse in which they are implicated. The difficulty of this ironic enterprise—and indeed the very reason it must be ironic—is that this type of legal criticism constantly risks (re)producing in new ways the same old subject roles and identities, the same old stabilized accounts of law, that it seeks to trouble and displace.

Ironists refuse to take sides in the debate between foundationalists and antifoundationalists. Ironists express "incredulity" towards all meta-narratives, even those that claim to be antifoundational in nature.<sup>147</sup> They point out the ironic juxtapositions of different "styles" between foundational and antifoundational arguments. They seem to say, "Here, look how this style embodies a particular vision . . . and how it is challenged by the style next to it, and by the style next to that."<sup>148</sup> Ironists thus remain agnostic about whether one style or another is the "correct" or "best" style for understanding social phenomena.<sup>149</sup>

Ironists are not terribly interested in deciding which is the best or correct approach for legal analysis because they do not think anyone is in a position to know. Unlike legal thinkers who act as if they are putting the last final touch on a nearly completed legal edifice, ironists assert that legal thinkers actually know little about how the law actually works as a discursive form of knowledge. Ironists argue that legal thinkers should spend more time figuring out how the discursive regimes they practice—formalism, instrumentalism, legal process, grand theory, etc.—serve to "legislate" the normative character of their academic and professional work.

For example, while Schlag's form of postmodern criticism is aimed at getting legal theorists to question who is the subject in control of modern legal analysis, Schlag remains silent about what legal theorists should do once they become aware of the necessity of this inquiry. The point is that ironists like Schlag resist issuing their own normative judgment about the missing subject. Schlag's strategy in dealing with the problem of critical inquiry about the subject is to produce a recognition in the subjects of law of their own decenteredness so as to allow them to appreciate their role in fostering

<sup>146.</sup> See Pierre Schlag, "Le Hors De Texte, C'est Moi" The Politics of Form and the Domestication of Deconstruction, 11 CARDOZO L. REV. 1631 (1990).

<sup>147.</sup> Of course, even antifoundational discourses have similar intellectual foundations even though these "foundations" are characterized as being antifoundational, anti-essential, and anti-Western.

<sup>148.</sup> James Boyle, Is Subjectivity Possible? The Postmodern Subject in Legal Theory, 62 U. COLO. L. REV. 489, 503 (1991).

<sup>149.</sup> Instead, they seek to expose how intellectual practices in the law are mediated and constructed by their own "self-referential end . . . [which is] coextensive with the operation, performance, reproduction, and proliferation of bureaucratic practices and institutions." Normative and Nowhere to Go, supra note 87, at 186.

a legal normativity that is forever producing soothing, self-congratulatory accounts of itself.<sup>150</sup> What is missing in ironist legal criticism is a convincing account about what legal subjects are supposed to do once they become aware of their decentered and precarious situation within the discourse of law. Some believe that law's need for an analyst compels ironists to break their silence on this basic question.<sup>151</sup> This Schlag refuses to do.

## B. Modern and Postmodern Concepts of the Self

One way to understand postmodern jurisprudence and its dilemmas is to view postmodernism as a subject-formation type of criticism: Postmoderns criticize and react against the definition of the legal subject found within modern conceptual and normative jurisprudence. The concept of self in modern theory defines the legal subject or person "back there" in control of the analysis and reason of the law. In modern legal theory, the subject is the judge who engages in "reasoned elaboration" and applies "neutral principles." In fundamental rights discourse, this subject is the idealized judge, Ronald Dworkin, identified as Hercules in *Law's Empire*. As Schlag describes it, he "is the idealized self-image of the legal academic who by virtue of his intellectual prowess and his commitment to the rule of law applies his overarching legal knowledge to rewrite the case law in a way that is morally appealing." Schlag calls this idealized definition of the subject the *relatively* autonomous subject of normative legal thought. 154

While modern legal theory internalizes a "centered sense of the self," postmodern critics advance either a *situated* or *decentered* concept of self.<sup>155</sup> The idea of the *situated self* is developed from an understanding of subjectivity that "emphasizes that the self is formed only through a relationship with others." The implications of situated subjectivity can be found in Posner's pragmatic manifesto. For Posner, "law is functional, not expressive or symbolic either in aspiration or—so far as yet appears—in effect." <sup>157</sup>

- 150. See, e.g., Schlag, Problem of the Subject, supra note 127, at 1629; see also Pierre Schlag, Contradiction and Denial, 87 MICH. L. REV. 1216 (1989).
  - 151. See generally Caudill, supra note 130.
  - 152. See Schlag, Normativity and the Politics of Form, supra note 139, at 845.
  - 153. See Schlag, Normativity and the Politics of Form, supra note 139, at 845.
- 154. Schlag, Normativity and the Politics of Form, supra note 139, at 845. According to Schlag, "[t]his self is relatively autonomous in several senses of the term relative. First, this self is only relatively autonomous as opposed to say fully autonomous or non-autonomous. At the same time, however, this self is also relatively autonomous in the sense that it takes a 'relative' stance concerning its own autonomy. The relatively autonomous self is relatively so in yet a third sense of relative . . . . Paradoxically, this self is a creature whose structure is in part constituted by the legal texts, but who is in part constituted to act and understand itself to be autonomous." Schlag, Normativity and the Politics of Form, supra note 139, at 845. See also Schlag, The Problem of the Subject, supra note 127.
  - 155. See generally Frug, Decentering Centralization, supra note 85.
- 156. Frug, Decentering Centralization, supra note 85, at 273. As Frug notes, the form of subjectivity has inspired a "wide variety of communitarians, civic republicans, and feminists, among others." Frug, Decentering Centralization, supra note 85, at 273.
- 157. POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 460. The functional nature of law is understood by examining how law functions in context. To comprehend this, judges must develop a situated

Posner's functional orientation is guided more by the contingent fact analysis of an interpretive subject than objective, neutral, and external interpretive criteria. Posner's pragmatism thus criticizes modernist theories of law from the perspective of a situated functional interpretive subject. Legal modernists are criticized for misunderstanding the nature of the human subject and for confusing their descriptions and analyses of the law with objective, autonomous law. Hence, Posner declares: "I call what lawyers do in their argumentative or justificatory capacity *rhetoric* rather than *reasoning* because so much legal writing, even of the most celebrated sort, has only the form and not the substance of intellectual rigor." 159

Postmodern ironists believe there is no core component of the self, only a shifting set of references of multiple identities. Ironists attempt to bring out the multiple identities of human subjects that contemporary legal scholars have uncritically ignored. As Schlag states, "Postmodernism questions the integrity, the coherence, and the actual identity of the humanist individual self—the knowing sort of self produced by Enlightenment epistemology and featured so often as the dominant self-image of the professional academic." If the professional academic." It is not core component of the self, only a shifting set of references of multiple identities.

Rejecting the possibility of finding "correct" solutions to legal problems based on conceptual formulations of some foundational concept of the "Rule of Law" or "legal subject," postmodernists argue for new understandings derived from an awareness of the reciprocal nature of law, culture, and individual subjectivity. Postmodernists thus attempt to inspire legal scholars to contemplate the possibility of a new framework for analyzing law, one that offers a transformed concept of what it means to solve legal and theoretical issues generally. Their goal is to awaken the legal subjects of law so that they might better appreciate how they are implicated in the production of a rather arid form of legal normativity.

What is different about postmodern jurisprudence is its unabashed acceptance of the impossibility of solving legal problems under an ideal set of conceptual solutions. While modernists seek to solve and overcome paradox and predicament, postmodernists embrace paradox and predicament as an unescapable condition of contemporary intellectual thought. One significant advance that postmodernists have made is to recognize that the

understanding of human subjectivity in the process of decision-making. The pragmatic concept of self is thus defined by a theory of behaviorism of *situated* individuals. As Posner has explained: "The law is not interested in the soul or even the mind. It has adopted a severely behaviorist concept of human activity as sufficient to its ends and tractable to its means." POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 460.

158. See, e.g., POSNER, OVERCOMING LAW, supra note 93, at 532 ("We construct—not always consciously of course—the self that we present to the outside world."). Posner seems to believe that human subjects can construct their identity from their contextual and social situation in a very self-conscious manner much like the way we choose to dress in a certain way or change our physical appearance by cosmetic surgery. ("We construct [our identities] by what we do, what we wear . . . , what we say, and what we don't say; by cosmetics and sometimes by cosmetic surgery."). POSNER, OVERCOMING LAW, supra note 93, at 460. Ironists would reject this view of the subject because they do not believe that subjects can intentionally will their own identities. Cf. Schlag, Clerks in the Maze, supra note 135.

- 159. POSNER, OVERCOMING LAW, supra note 93, at 73 (emphasis in original) (footnote omitted).
- 160. See Frug, Decentering Centralization, supra note 85, at 304-12.
- 161. Normative and Nowhere to Go, supra note 87, at 173.

puzzles and predicaments of modern theory (the gaps between what we know and what we desire to know and control) are irreconcilable. What distinguishes postmodernists from modernists is the way they position themselves in relation to intellectual paradox and predicament.

Modernists can neither accept nor rest content with paradox and predicament. For modernists, paradox and predicament are flaws or weaknesses that must be overcome. Postmodernists, on the other hand, regard paradox and predicament as important aspects of the postmodern condition. As John Patrick Diggins put it:

[T]he contemporary 'postmodernist' offers a different message: we should go beyond modernism and take a more relaxed look at things, either by comprehending how knowledge, power, and society function, by viewing history without purpose and meaning as simply the longing of human desire for its completion, or by giving up trying to explain the nature of things and being content with studying how beliefs come to be justified.<sup>163</sup>

Postmodern legal critics like Posner and Schlag break from the modernist dogma of universal and autonomous law to step beyond modernism and its culture of fundamental individualism. Contemporary legal pragmatists such as Richard Posner want to bracket or set aside questions of legal coherence and instead emphasize what is useful or helpful in the way of belief. Ironists such as Pierre Schlag want to focus more directly on problems of legal coherence in order to better understand how legal discourse and practice works to "legislate" particular sorts of beliefs such as law's normativity. The dilemma of postmodernism, however, is that it resides within the predicaments and paradoxes of modernism. Postmodernism remains ambivalent about its own attachment to modernism. While postmodernists may have failed, at least as of yet, to transcend the predicament of the current intellectual situation in legal studies, they have been successful in teasing that predicament out of the styles, aesthethics, and condition of modern legal studies.

Postmodernism emerges in response to the crisis and predicaments intensified by contemporary pragmatic and ironic criticism. These new forms of legal criticism have brought attention to the need for tolerance of diversity existing in the larger culture. Without doubt, the "buzz word" in the academy today is multiculturalism. Multiculturalism is about diversity and culture. Its appeal is based on the belief of many women, gay, and non-white Americans that the discourse of modern law has erected a barrier that excludes minority perspectives and discourses from active participation in the deliberative processes of the law. In their writing about the law, contemporary legal thinkers, whether they be pragmatist or ironist critics, reveal, wittingly and unwittingly, how legal texts, discourses, codes, and canons of legal interpretation deny the existence of alternative and different notions of the self. Neopragmatists provide examples of what law might be like if legal analysts adopted a more situated concept of subjectivity,

<sup>162.</sup> Or as Pierre Schlag put it: "[o]ne significant advance that postmodernists have made is to recognize that thought and the thinker (you and I) themselves operate within what economists call a second best world and that the first best world of traditional legal, social, and philosophical thought which routinely insists on naive rationalist conceptions of coherence, consistency, elegance, etc., is largely the product of disciplinary hubris and the inertia of academic bureaucracy." Normative and Nowhere to Go, supra note 87, at 174 n.18.

<sup>163.</sup> PROMISE OF PRAGMATISM, supra note 32, at 8.

whereas legal ironists advance the cause of a more radical transformation by championing the intellectual virtues of a decentered concept of subjectivity. While they reflect different critical moods and intellectual aesthetics, pragmatist and ironistist legal critics reinforce the postmodern revolt against the style, form, and aesthetic of legal modernism. Hence, while they are hardly homogeneous, Posner and Schlag are working to shape two different sides of postmodern legal thought.

#### CONCLUSION

Modern legal scholars—theorists, historians, doctrinalists, and the like—have insisted upon the need to separate law from society in order to say meaningful things about the relation law shares with culture. The boundary between law and society has consequently become a familiar way legal moderns maintain their belief that the law can be discovered conceptually in the object-forms of rules, principles, doctrines, or "culture." Langdell believed that the object-forms of the law were immune from the ever-changing nature of society. Holmes believed that external objective legal standards were needed to ensure that judges refrain from taking sides in "struggles for life." Society might change, but both Langdell and Holmes thought universal principles of law would endure. Modern-day legal theorists reject the idea of an artificially fixed line between law and society, but they continue to believe as Langdell and Holmes believed that law and culture must be studied separately for purposes of understanding law's role in society.

Postmoderns reject the inside/outside law-and-society distinction. Postmoderns claim there is no "outside" position that one can define or locate for studying either law or society as a separate, autonomous entity. Postmoderns assert that the study of law and society must be re-examined from different intellectual practices, discourses, life-styles, and world views of different cultures. Postmoderns, whether of the quasi-postmodern variety represented by Posner or the more robust ironic variety represented by Schlag, are in agreement in their rejection of forms of jurisprudence committed to the legal modernist's belief in foundational essences. The dilemma of legal modernism has been its inability, despite the best intentions of modern legal scholars, to mount an effective counter-attack to the subversive assault of the likes of seemingly dissimilar legal thinkers such as Posner and Schlag.

Yet, there is reason to wonder whether postmodern legal criticism is but another development in the cycle of exhaustion and renewal of the "movements" of legal modernism. The current intellectual mood is captured by the experience of "exhilaration" that soon gives way to "ennui" as the latest "provocative new piece of legal thought" is classified as "yet another possibly clever, perhaps thoughtful, but nonetheless utterly failed contribution." In following the twists and turns of legal scholarship, the word pastiche comes to mind: It is the experience of déjà vu, the feeling that comes from the realization that each new development in legal theory represents a slightly different variation of an older idea or theory. New jurisprudential developments seem to offer only new twists, new words, and new emphases on old argumentative patterns of jurisprudence generating what Robert Scott has called a "recycling process." The position of

<sup>164.</sup> Normative and Nowhere to Go, supra note 87, at 167.

<sup>165.</sup> See Robert E. Scott, Chaos Theory and the Justice Paradox, 35 WM. & MARY L. REV. 329, 330

contemporary postmodern legal theorists such as Posner and Schlag is not unlike the position of Langdell and Holmes, who agreed that conceptualism in the law was inevitable, but disagreed that conceptualization would make the law more like a science. Posner and Schlag agree that legal analysis is culturally and linguistically contingent, but disagree on the possibility of discovering a situated, instrumental analysis to coherently guide legal analysis to correct answers, pragmatically defined. Postmodern pragmatists seek to reform modern legal analysis and instruct its practitioners on how to be more pragmatic and instrumental in their method. Postmodern ironists, on the other hand, attempt to intensify awareness of the inability of any legal method to reach closure.

The two sides of postmodernism reflected in the legal scholarship of Posner and Schlag thus mirror the tension and disagreement of the two sides of legal modernism reflected in the legal scholarship of Langdell and Holmes. Some may see this as evidence that postmodernism is merely the latest permutation of the "boom and bust" cycle of legal modernism. To legal modernists, postmodernism may be just another interesting attempt to advance legal modernism to a new and different intellectual level.

Postmodernists are quite unlikely to deny the patterns and movements of legal modernism.<sup>167</sup> Postmodernists would point out that the recycling process of modern legal

(1993). According to Scott, this "recycling process" has enabled each new generation of legal scholars to repackage old ideas and old theories in new theoretical packages. Hence, "Each [new] generation... offers a different metatheory to explain or understand legal phenomena, rejecting the perspectives of the previous generation in the hope of more successfully solving [law's many problems]." *Id*.

166. One might argue, as David Luban has argued, that postmodernism in legal scholarship expresses a late-1980s neo-Kantian perspective characteristic of late modernism. The improvisations of postmodernism in Luban's view are a form of "self-criticism" that attempt to develop "jurisprudence within jurisprudence" and thus repudiate the negation of modern jurisprudence. See Luban, Legal Modernism, supra note 1, at 1663 ("Modernist art is the determinate negation of premodernism."). Luban's view suggests that recent legal criticism attempts to "live up to the quality achieved by the great premodernist (classical) works." Luban, Legal Modernism, supra note 1, at 1663.

Luban's neo-Kantian characterization of postmodernism, however, is too self-consciously rooted in the past, too caught up in Kantian rational thought, to capture the irony of postmodern criticism. As Luban acknowledges: "I am no fan of the avant-gardist interpretation of modernism. . . . I revere too much of the past—too much art, too much history, too many ideals and institutions—to have any real sympathy with the avant-gardist sensibility." Luban, Legal Modernism, supra note 1, at 1681-82. Kantian rational thought cannot survive postmodernism because postmodernism seeks to overturn linguistic, conceptual, and normative underpinnings of the modernist conception of reason attributable to the philosophy of Kant. Kant believed that individual freedom and human rationality were ineluctably connected, and neo-Kantians remain committed to that view. Postmoderns (the robust ironic critics as distinguished from the neopragmatists) argue that concepts about rationality and individuality are mediated and constructed by a language which is incapable of grasping reality. "The postmodern conception of individuality [thus] casts the individual not as the subject in control of discourse, but as an artifact produced by discourse." Dennis Patterson, Postmodern/Feminism/Law, 77 CORNELL L. Rev. 254 (1992). The improvisations of postmodernism represent the creation of new identities and new subjects for overcoming, not improving, the vestiges of modernism.

167. They would assert that "[t]here is no sense in doing without the concepts of metaphysics in order to shake metaphysics . . . . [They would say that they] can pronounce not a single destructive proposition which has not already had to slip into the form, the logic, and the implicit postulations of precisely what it seeks to

scholarship is not unique to law but is rather characteristic of a more general mood of unrest in the university. They would bring attention to the spectacle of a slowly emerging awareness of a new type of crisis not just in the law, or in the arts, or in the sciences, but of modernist culture itself.<sup>168</sup> Postmodernists would assert that the growing awareness of this crisis within the legal academy has "moved" modernism to a new transformative "postmodern" position.

Thus, there is reason to believe that there is something fundamentally different about the aesthetic forms of legal criticism that I have attributed to the recent work of Posner and Schlag. These legal scholars, unlike their modern counterparts, are forthright about their desire to move beyond modernist legal culture. Both seem to say that modernist legal culture is itself the source of the modernist's predicament. In reacting to the predicament of modern law, both of these legal scholars seem to be offering a new message for the legal academy. Posner seems to argue that legal theorists should "overcome" the modernist's urge to discover the foundations of jurisprudence and instead adopt a more pragmatic "relaxed" attitude predicated upon a "jurisprudence without foundations." Posner thus cheerfully encourages legal theorists to give up on their traditional "preoccupation" with establishing the "autonomy" and "objectivity" of law because he believes we in law can do everything we did before, even better, without foundations or essences. 170 Schlag, on the other hand, is more serious and less sanguine; he argues that modernism and its influence can never be overcome by a lone author. He urges modern legal scholars to spend a lot more time trying to figure out what is going on in the discourse of law; and a lot less time prescribing or dictating what should be going on, and using their knowledge to "legislate" what is going on. 171

The static conceptualism of Langdell and the fundamentalism of Holmes's legal pragmatism are thus put into question by the forms of legal criticism engaged by Posner and Schlag. Posner and Schlag have challenged aspects of legal modernist culture that purport to endow the law with the qualities of objectivity and neutrality, properties which have heretofore provided legal scholars, judges, and practitioners with an autonomous and fundamental subjectivity. Posner and Schlag, whether they acknowledge it or not, are very much writing in a new tradition for legal studies, a tradition based on a new mood and cultural perspective which may lead to the discovery of new meaning and new understandings about law, culture, and politics.

It is still an open question, of course, whether modern legal scholars will be able to reverse this course and revive the confidence they once enjoyed in the projects of legal modernism. Legal modernism has always thrived on crisis and movement, and it is possible that it will survive the crisis of postmodernism. The ability to absorb new movements has always been a strong quality of modernism. Postmodernists must wonder, then, whether their mood and their aesthetic form of criticism can survive the reductive

contest." Normative and Nowhere to Go, supra note 87, at 174 n.18 (quoting Jacques Derrida, Structure, Sign and Play in the Discourse of the Human Sciences, in WRITING AND DIFFERENCE 280 (A Bass trans., 1978)).

<sup>168.</sup> See Huyssen, supra note 5, at 48.

<sup>169.</sup> See, e.g., POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 3, at 425-69.

<sup>170.</sup> POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 3, at 454.

<sup>171.</sup> See, e.g., Normative and Nowhere to Go, supra note 87.

and deeply conservative ideology of modern legal culture.<sup>172</sup> One wonders whether the postmodernist is in the proverbial position of the hare being chased by hedgehogs: "In some ways, the story of modernism and postmodernism is like the story of the hedgehog and the hare: the hare could not win because there always was more than just one hedgehog. But the hare was still the better runner . . . ."<sup>173</sup>

<sup>172.</sup> Confronted by the critic who rhetorically asks: "What does this essay have to do with the law?", I am reminded of the dilemma of the postmodernist critic who is put to the task of defending her work on modernist terms. Postmodernists are, at every turn, asked to explain and defend the foundational essence of postmodern "theory," postmodern "practice," and the "normative" postmodern vision. Postmodernists, of course, refuse to do this since it would require them to accept the modernist's aesthetic framework. Instead, postmodernists offer modernists a new message: legal thinkers should adopt a new attitude in their work; they should "overcome" their compulsive urge to know fundamental "truth" and instead focus their intellectual energies in figuring out how their knowledge, language, culture, gender, class, and race help them shape what they think lawyers actually do when they say they are "doing law."

<sup>173.</sup> Huyssen, supra note 5, at 49.

# LAW AND ENDANGERED SPECIES: IS SURVIVAL ALONE CAUSE FOR CELEBRATION?

### JOHN HENRY SCHLEGEL\*

I know that it is heretical to say so, but the spotted owl may not be in danger of extinction. It seems that a wildlife biologist curious about why spotted owls would prefer old growth forest to new, went looking for the species in several places where old growth had been clear cut and new growth planted. To his astonishment he found the new growth forest alive with spotted owls. To explain this finding he noticed that the understory of an old growth forest is relatively dark and thus not noted for the lushness and variability of the plant growth, while the new growth forest is lighter and so has more and more varied understory growth. The understory of a new growth forest thus produces relatively more edible seeds for small rodents to feed on and so is home to more rodents per acre than is old growth forest. Given that spotted owls live on rodents, the relative scarcity of rodents in the old growth forest means that it takes more acreage to support one owl pair in old growth forest than in new. So the owls in old growth forest appear to be endangered when in fact they are just eking out a living under conditions that we see as glorious but that for them are harsh.

Why tell this story? I can't say that I hate owls and I love old growth forest, enough that I would support condemning vast tracks to preserve it from logging. So, I am not trying to take a position on the Endangered Species Act. No, my point is different. At the time of a centennial I think it is important to recognize the possibility that what may seem to be a great achievement—one hundred years of this law school and similar amounts for many others—indeed an achievement so fragile that it is worthy of preservation in its pristine beauty, when looked at in another light may be nothing of the kind, may indeed seem so unremarkable that clear-cutting might be appropriate. Put more bluntly, although many people lament the decline of the legal profession in general and of legal education in particular, I wish to suggest that it may be time to take the chain saw to the law school as we know it. It is just possible that were we to do so we would find that law students, and maybe even law professors, like spotted owls, might turn out to thrive in the new growth that would follow.

To focus my discussion I wish to begin by looking at one of the current responses to unease about the present condition of the legal profession, the so-called MacCrate Report.<sup>2</sup> Then I propose to look at selected events in the history of American legal education at three earlier times: in the years after the Civil War, after the turn of the

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<sup>1.</sup> Frank H. Easterbrook, *The Birds*, 210 New Republic 22 (1994) reports the information recounted in this paragraph.

<sup>2.</sup> AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) [hereinafter cited as MacCrate Report without cross-reference].

century, and between the two World Wars. I look at these events to shed light on the Report. That done, I will return to the Report in an attempt to explain why this document continues to make mistakes that are over one hundred years old and so is part of the problem with legal education, and anything but the solution to present discontents that it sees itself to be. Of course, to implement a solution one would have to clear-cut an old growth forest. While there are clearly enough monkeys and enough typewriters to keep the law reviews going for generations to come, there is reason to doubt that there are enough chain saws and enough naked lumber jacks to take down that forest.

If one believes the literature, these are any but joyful times for the legal profession. "Poohbahs" of all stripes lament the decline of this or that. The new dean of the Yale Law School laments the loss of the lawyer-statesman ideal as law becomes a business—as if Paul D. Cravath were a social worker—and fears that there is no turning back.<sup>3</sup> Earlier the Stanley Commission decried the decline in professionalism in the bar and noted that increased economic competition, brought about by an increase in the number of lawyers and the elimination of anti-competitive practices, together with a decline in profit margins and the absence of hortatory aspirations from the codes of professional responsibility, had either led to this decline or was symptomatic of it or both.<sup>4</sup> Deans cry that law school budgets are being squeezed by rising costs and flat revenues and that diversity is threatened by excessively detailed accreditation standards<sup>5</sup> while the accreditors worry that their autonomy is being eroded by an ever more intrusive federal bureaucracy.<sup>6</sup> Law students are finding that jobs are scarce and poorly paid when found, while debts incurred to finance legal education are onerous in an anything but inflating economy. Law professors are surly as moving to a "better" school becomes harder, even though atheriosclerosis abounds, since everyone "old" and in need of replacing is fifty and, thanks to Claude Pepper, never has to retire from a light lifting job. Into this black cloudfilled sky comes the MacCrate Report promising a brighter day. What might an historian make of such a promise?

The MacCrate Report, Legal Education and Professional Development—An Educational Continuum, to give it its proper name, is a product of the Task Force on Law Schools and the Profession: Narrowing the Gap of the Section of Legal Education and Admission to the Bar of the American Bar Association. The common name comes from the Chair of that Task Force, Robert MacCrate, a retired partner at Sullivan & Cromwell. As is usual in such matters, the Task Force was made up of a melange of deans, law professors, ex-law professors, judges and practitioners interested in legal education, clearly a peculiar subset of practitioners generally. The group did the standard Task Force number by collecting written submissions and holding numerous open hearings before producing its report. That report, like all such reports, is a curious mix of the interests of its dominant members. But it makes two basic points. One is quite sensible: that the

<sup>3.</sup> Anthony J. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession (1993).

<sup>4.</sup> AMERICAN BAR ASSOCIATION, COMMITTEE ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986).

<sup>5.</sup> John J. Costonis, *The MacCrate Report: Of Loaves, Fishes and the Future of Legal Education*, 43 J. LEGAL ED. 757 (1993); Ronald A. Cass, et al., to "Dear 2," April 29, 1994, circular letter to "all ABA Deans" (on file with author).

<sup>6.</sup> One need only to hang around in the right corridors to hear this expressed in anguished tones.

educational development of a professional is a process that begins before law school and continues throughout practice. The other, quite odd: that the law school part of a professional's education would immeasurably benefit from the law school's emphasis on teaching its students a list of Task Force-supplied skills and values.

Accept for the moment the premise that there is a "gap" between what is provided to a student in law school and what that student will need to engage in the practice of law. Unless one believes that there is always a "gap" between intent and act—that the law in action is always and of necessity going to be something other than the law on the books, to use Pound's metaphor for the "gap"—then the only thing a proper Task Force can do is to work to close the "gap." And this is precisely what the Task Force did. As an effort to close the asserted "gap," its two basic points fit together quite well to reflect an interesting compromise. The practitioners and their allies agreed that it was everyone's job to close the "gap," since professional education was a lifelong process, and the law professors, content that they were not being asked to do all the gap filling, agreed that they would improve their teaching with respect to the items in the statement of skills and values.

It would be stupid to deny the existence of the "gap" between what the law schools provide and what the practice of law might demand, even for one who believes as I do that such gaps are inevitable, indeed a sign of health in human institutions, since gapless States are either totalitarian or morbid. Present and recent law students remind faculty of the gap every day with their complaints about law school's being too theoretical and not practical enough, their rush to fill the available clinical courses, and the gripes heard wherever recent graduates collect. Older alumni can be heard to make the same complaints, though often with less sophistication. All that said, however, the connection between the recurrent observations by students and alumni about a gap and the statement of skills and values offered by the MacCrate Report is in one sense not obvious at all, and in another sense too obvious and obviously wrong. To understand how these two contradictory things could be simultaneously true, one needs to examine the Report in some detail.

The Report starts out with a truly wondrous survey of changes in the practice of law over the past twenty-five years. It emphasizes the proportional increase in the number of lawyers, the number of female lawyers, and the number of minority lawyers. At the same time it canvases the equally startling changes in the conditions of practice, including the growth of the very large corporate firm and the development of legal services for the poor, legal clinics for the middle class, and advocates for group legal rights. Then, it turns to the more traditional division of the profession into solo practitioners and small firms in contrast to medium and large size firms.

For the former it documents the proliferation of specialties that render most general practitioners anything but general practitioners. Unfortunately, the concomitant decline of trial work as a percentage of the general practitioner's plate of activities gets suppressed. This is because data that suggests that lawsuits are filed in only ten percent of the disputes brought to counsel for resolution, and in only eight percent of those lawsuits is a trial actually held, gets crossed with data that emphasizes litigation-related

<sup>7.</sup> MacCrate Report at 13-28.

<sup>8.</sup> Id. at 47-87.

<sup>9.</sup> Id. at 35-46.

activities as a disproportionate part of the lawyer's time spent on dispute resolution.<sup>10</sup> Unfortunately, both sets of data ignore all of the work that lawyers do that has nothing to do with disputes and disputing, as well as fails to notice the degree to which much litigation that may be part of a formal dispute—over an unpaid bill, for example—is largely administrative in nature. Most collections, foreclosures and divorces tend to be more like recording a deed than mounting a jury trial. But still the description of the world of the solo and small firm practitioner is vivid and enlightening.

In looking at medium and large firm practice, the Report emphasizes "the newly competitive, profit oriented environment," of departmentally-organized, really by sub-specialty, medium and large firms, and the proliferation of branch offices of these firms, most often out-of-state branches. Thereafter, the growth of the corporate law department is chronicled with its "stressful position at the center of the tension between company culture and professional ideals." And finally the "richly varied" work of the governmental practitioners at the local (and inferentially the state and federal) level is noted in modest detail.

It is not obvious how, given this vast diversity of practices, any Task Force could identify one set of skills and values that is necessary to all practices and practitioners. About the only thing common to the activities of a small family practitioner and a city prosecutor is the possibility that they may meet in the same courthouse; the only similarity between a large firm bond lawyer and house counsel engaged in contract review may be a common client. These four lawyers share little more than the fact that each possesses a license to practice law, though even here it is not necessary that, even if all carry on their activities in the same city, all must be licensed in the same state. So, the failure of fifty years of scholarship to produce agreement on a list of skills and values common to all kinds of practice<sup>14</sup> suggests that it would require much luck for three years of work by part-time volunteers to have generated an adequate list.

In another sense, it is all too obvious how such a single list could be produced, as careful examination of the Report discloses. Toward the end of the Task Force's demonstration of the cornucopia of practice opportunities for lawyers and the accompanying extraordinary variation in the routine activities (practices in another sense) of lawyers today, the following assertion is made:

The professional ideal of a unitary profession with its core body of knowledge, skills and values, common educational requirements and shared professional standards has, to a significant degree, survived the profession's profound transformation in the 1970s and 1980s. It has survived despite the enormous pressures within and without the profession to capitulate completely to commercialization and to divide into a series of economic sub-markets in which

<sup>10.</sup> Id. at 39-40.

<sup>11.</sup> Id. at 80.

<sup>12.</sup> Id. at 95.

<sup>13.</sup> Id. at 97.

<sup>14.</sup> Committee on the Curriculum, Association of American Law Schools, Report, in ASSOCIATION OF AMERICAN LAW SCHOOLS, HANDBOOK AND PROCEEDINGS 168 (1944) begins this search. Irvin C. Rutter, Designing and Teaching the First Degree Curriculum, 37 U. CIN. L. REV. 7 (1968) is its probable peak.

separate groups of lawyers sell highly specialized legal services to different consumer groups with little or no interaction among the various lawyer groups.<sup>15</sup>

This statement is later followed by two variations on this theme:

For a profession to create for itself an identity, it must not only claim as its own a specialty of learning and skills—for which the legal profession looked increasingly to the law schools—but it must also embrace a core body of values which sets members of the profession apart and justifies their claim to an exclusive right to engage in the profession's activities. "Professionalism" lies in adherence to such values.<sup>16</sup>

At its organizational meeting [in 1879], the ABA established a Standing Committee on Legal Education and charged it with developing a program which visualized a unitary legal profession with common admissions and educational standards.<sup>17</sup>

### Thereafter comes an obvious conclusion:

If a single public profession of shared learning, skills and professional values is to survive into the 21st century, the law schools together with the bar and the judiciary must all work for the perpetuation of core legal knowledge together with the fundamental lawyering skills and professional values that identify a distinct profession of law throughout the United States.<sup>18</sup>

In short, if the profession is to continue to pursue the "ideal" (though not necessarily the reality) of a unitary profession, then it "must" continue to offer up a single set of skills and values that binds that profession together. As the tone of these excerpts suggests, the Task Force was not about to suggest abandoning the age old ideal.

Now, no one should infer that the Task Force was not aware of the relative incongruity of statements about the need for a unitary profession in a report that demonstrates that there is no such thing, for the Report offers an argument directed at this problem. It suggests that all lawyers need to be "well trained generalist[s]," even though few lawyers actually have general practices, because "any problem presented by a client . . . may be amenable to a variety of types of solutions of differing degrees of efficacy; a lawyer cannot competently represent or advise the client . . . unless he or she has the breadth of knowledge and skill necessary to perceive, evaluate, and begin to pursue each of the options." Whether that argument is persuasive or not is less important than the assertion that follows it.

Whether a lawyer is working alone or as a member of a team, substantive knowledge—and often highly specialized substantive knowledge—is necessary to complement the skills and values that are the subject of this statement. In

<sup>15.</sup> MacCrate Report at 86.

<sup>16.</sup> Id. at 108.

<sup>17.</sup> Id. at 106.

<sup>18.</sup> Id. at 120.

<sup>19.</sup> Id. at 124.

choosing to focus on skills and values, the Task Force did not ignore or underestimate the important role that substantive knowledge plays in the process of preparing for competent practice. The Task Force fully appreciated that attention has been, and surely will continue to be, given to the question of what aspects of substantive law should be included in a course of preparation for all new members of the profession. But, the Task Force concluded this issue is sufficiently distinct from an analysis of skills and values that the Statement should not attempt to address both.<sup>20</sup>

Having thus put the greater portion of the existing law school curriculum aside, for the next hundred pages the report sets forth and analyzes the statement of the ten skills and four values for which it is justly famous.

The detailed text of the statement of skills and values is of little importance to me, though it has the feeling of the abstract unreality of a junior high school lesson in how to write a term paper or an overly clinical description of the child rearing practices of a particularly exotic species of birds. A brief summary of the structure of the statement of skills will suffice for present purposes. "It begins with two analytical skills that are the conceptual foundation for virtually all aspects of legal practice: problem solving . . . and legal analysis." There follow five skills "essential throughout a wide range of legal practice": legal research, factual investigation, communication (both written and oral), counseling and negotiation.<sup>22</sup> Then comes litigation and alternative dispute resolution, seen as fundamental because "[a]lthough there are many lawyers who do not engage in litigation or make use of alternative dispute resolution mechanisms, even these lawyers are frequently in a position of having to consider litigation or alternative dispute resolution as possible solutions" to a client's problem, a task that requires "at least a basic familiarity" with the aspects of this skill.<sup>23</sup> Finally there are the skills of managing legal work effectively and recognizing and resolving ethical dilemmas.

In one sense it is silly for me to have read you all of this text from the MacCrate Report for most of it is unremarkably obvious, as I said before, and thus cannot be distinguished from the statement of skills and values. Since before the First World War it has been clear that there are at least two practices of law. Heinz and Laumann<sup>24</sup> and Zemans and Rosenblum<sup>25</sup> demonstrated that proposition about ten years ago with state of the art social science rigor and this Report undercuts their conclusion only to the extent that it demonstrates that two is too small a number. Yet, despite all of these well documented "facts," the number of assertions about the unitary nature of the bar continue to far outnumber the contrary assertions.

Similarly commonplace over an even longer time frame are assertions that the law schools, the bench and the bar should cooperate to improve the practice of law, despite

<sup>20.</sup> Id. at 125.

<sup>21.</sup> Id. at 135.

<sup>22.</sup> *Id*.

<sup>23.</sup> *Id*.

<sup>24.</sup> JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982).

<sup>25.</sup> Frances Kahn Zemans & Victor G. Rosenblum, Making of a Public Profession (1981).

good evidence that all three manage to do so somewhat less frequently than orangutans come together to mate and that such attempts at cooperation, like orangutan's liaisons, are about as lasting. Indeed, careful work would, I believe, show that calls for cooperation issued by any one of the three parties are most frequently heard when that party wants one of the others either to do something for the benefit of the calling party or to stop doing something that the calling party finds inimical to its interests. That is a peculiar basis for cooperation.

On the whole the list of skills set forth in the Report, though of much shorter lineage, is nothing but the standard litany of the majority of clinical instructors (and research and writing instructors, another group of second class citizens) in the law schools. The most forceful advocate of this view is Tony Amsterdam, not coincidentally a member of the Task Force and the most cited of the Report's sources on clinical education.<sup>26</sup> There are other views; Steve Wizner and Dennis Curtis have articulated one<sup>27</sup> and Frank Bloch, another.<sup>28</sup> But most clinicians talk about skills and indeed this particular group of skills. And it is this group of clinicians who earlier got assistance from the bar in securing their place in the law schools with the post-Watergate argument that clinical education is the best place to deal with ethical issues.

Even more telling, the entire project could be seen as a form of log-rolling by the participants. The clinicians get bar support for increasing clinical instruction; the bar gets students who are more practice-ready and therefore cost less to employ in a cost-conscious environment; the judiciary gets young practitioners who are minimally prepared for litigation despite the fact that many lawyers will last see a court room when they are sworn in, unless appearing as a party; and the ABA gets renewed affirmation of its central importance to the profession since it is the only possible representative of a unitary bar around, despite the fact that, as Ted Schneyer has so conclusively shown, the content of its own Code of Professional Responsibility shows exactly how fragmented even its own membership is.<sup>29</sup> Only the deans and the large class teachers get short sticks and even the deans get the promise that the statement of skills and values will not be magically transmuted into an accreditation requirement.

While all of this may be true, I do not think that either ho-hum or rampant cynicism is warranted in this case. For there is something to the ideas in the MacCrate Report that needs to be taken seriously.

I think it extraordinary that the analysis of professionalism in the Report tracks the standard academic understanding of that process; this, even though the originator of that analysis is obviously a bit of a Marxist.<sup>30</sup> To create a modern profession, one needs a

<sup>26.</sup> MacCrate Report at v. The basic cite for the Report is Anthony G. Amsterdam, Clinical Legal Education—A 21st-Century Perspective, 34 J. LEGAL EDUC. 612 (1984).

<sup>27.</sup> Stephen Wizner & Dennis Curtis, "Here's What We Do": Some Notes About Clinical Legal Education, 29 CLEV. St. L. Rev. 673 (1980).

<sup>28.</sup> Frank S. Bloch, The Andragogical Basis of Clinical Legal Education, 35 VAND. L. REV. 321 (1982).

<sup>29.</sup> Ted Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 L. & Soc. Inquiry. 677 (1989). See also, Ted Schneyer, Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study, 35 ARIZ L. REV. 363 (1993).

<sup>30.</sup> MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM (1977). A good review of the theoretical literature on professionalization can be found in Robert L. Nelson & David M. Trubek, New

separate area of knowledge and skill, usually provided for through education, and a set of values or standards that arguably support self-regulation by the group as against intrusive regulation by the State. Anyone conversant with the history of legal education knows that much of the point of the development of the American law school was to provide that core of knowledge, if not skill, exactly as the Report asserts.<sup>31</sup>

Now this process of professionalization is nothing more than an example of product differentiation of the kind that manufacturers of tooth paste, shampoo and detergent have mastered, but that fact should not stop one from recognizing that the question that the Report attempts to address is truly central to the profession and the Task Force knows it. This too is behind the assertion, however lame, of the unitary nature of the legal profession. To maintain the claim to self-regulation there must be a single body of knowledge, set of skills and shared values, at least unless one wishes to go about the task of justifying self-regulation for each specialty and sub-specialty of the law in the way that the medical profession has done through its panoply of specialist boards supported by extensive residencies. Such an approach is surely implausible for lawyers given the quite different elasticities of demand for legal as against medical services. The cost of a two year add-on residency in suburban real estate practice, to pick one of my favorite sub-specialties, could never be recouped out of future earnings; hell, it is arguable that, given the present employment market, many, if not most, students at any but the fanciest private law schools cannot pay off the cost of the existing three years of legal education within the standard loan repayment terms!

Thus, the recurrent use of the imperative verbal auxiliary "must"—the profession must claim special knowledge and skills, it must embrace a core body of values and the three branches of the profession must all work for the perpetuation of core legal knowledge skills and values—in the excerpts that I read to you is not accidental rhetorical overkill. Something significant is at stake here. It is the professionalization project itself.

Given the significance of what is at stake, the content of the intellectual center of the professionalization project bears close scrutiny. And again it is easy to dismiss that "core of legal knowledge . . . fundamental lawyering skills and professional values" that is trotted out every time one of these crusades is undertaken. Indeed, here one might argue that the skills listed are an example of imperialism on the part of the clinical instructors (or an attempt to co-opt the large class teacher), for, lo and behold, that supposedly quintessential first year, large class skill—thinking like a lawyer—turns up on the skills side of the equation as "legal analysis." But such easy dismissal is no more appropriate here than it was earlier.

Problems and New Paradigms in Studies of the Legal Profession, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 1, 15-22 (Robert L. Nelson, et al., 1991), a really interesting book of essays.

<sup>31.</sup> The standard cites here are JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976) and ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s (1983). The truly bored might look at John Henry Schlegel, Between the Harvard of the Founders and the American Legal Realists: The Professionalization of the American Law Professor, 35 J. LEGAL ED. 311 (1985).

<sup>32.</sup> MacCrate Report at 120.

Consider the structure that is cleanly produced when the Task Force sets aside the greatest portion of what is learned (whatever it is that is intended to be taught, at times at least a matter of willing self-delusion) in the traditional law school classroom in the interest of supposed convenience. With legal analysis moved to the skills side, the Report can be seen as having separated law study into theory—substantive knowledge—and practice—skills, a clean division that arguably fits perfectly with the ideology of the rule of law. Law is rules, even-handedly applied by lawyers who do not make, twist, warp or even shape them, but only apply them skillfully. One would have a hard time identifying a more obvious structure.

Given the internal dynamics of the Task Force, the choice to "not ignore or underestimate" but nonetheless set aside the importance of "substantive knowledge" for the "process of preparing for competent practice" made sense. The difficulty that the group had bringing into the fold the skills necessary for the work of the young associate in the medium or large firm made apparent that there was little point in attempting to identify a "core of legal knowledge," to use the words of the truly awful, narrow-minded ABA accreditation standard.<sup>33</sup> In our fragmented profession such an attempt would have required the group either to expend Herculean effort or be content to produce true pabulum.

But, if so treating theory were so obvious and so easy, why then is it so obviously wrong? For the time being I wish to leave that question, indeed to leave the MacCrate Report, and look at several events in the history of American legal education that implicate questions of theory and practice. In doing so, I hope to build a case for understanding the way that the Task Force conceptualized both theory and practice, in order then to address the obvious wrongness of that conceptualization. Let me start at what most people think of as the beginning: Christopher Columbus Langdell's Harvard.

Bill La Piana's recent book, *Logic and Experience*, makes the extraordinary claim that Langdell's reforms at Harvard, particularly the teaching of law from cases through dialog, succeeded because it was seen as more practical, fusing logic and experience, than the earlier way of teaching by lecture and recitation (whatever that practice was in fact).<sup>34</sup> The claim seems sensible; after all, who would undertake an intentionally impractical reform? Still, what then are we to make of the decision of a group of lawyers in Boston, including two teachers from the Harvard Law School, to establish the Boston University Law School just two years after Langdell's innovations at Harvard? Their reason for doing so was, in the words of the School's first historian, because "instruction . . . at Cambridge was particularly technical and historical, and when completed necessitated an apprenticeship in some good attorney's office," a statement made still more peculiar because it follows close on to the assertion that "the best system" of legal education

<sup>33.</sup> AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS (1992) in section 302 provides that all accredited law schools must offer "those subjects generally regarded as the core of the law school curriculum." It is difficult to decide whether the vague in terrorem effect of such a rule is worse than the failure of thought that it represents. Due care is a much overrated solution to legal problems.

<sup>34.</sup> WILLIAM P. LAPIANA, LOGIC & EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994).

<sup>35.</sup> George R. Swasey, Boston University Law School, 1 GREEN BAG 54, 55 (1889).

"embraced lectures in connection with the practical work of an office." It seems unlikely that this dispute was really over the timing of pieces of an education—apprenticeship after, as against apprenticeship during, classes—especially since the Boston faculty contained, as one of its core members, the best legal historian in the United States at the time, and even I would think twice before asserting that legal history was at the core of a practical education.

Justification for the practicality of Langdell's system was offered by Jeremiah Smith of the Harvard faculty. "[T]he young man who studies and analyzes the cases is doing much the same thing as he will afterwards be called upon to do in practice. He is endeavoring to apply law to facts." To what practice is this activity practical? And James Coolidge Carter, a prominent New York lawyer and as such a rather potent witness, offered that, "[f]ar from producing theoreticians, study of law . . . [from cases] produced young men 'of a great amount of actual acquirement, and—what is of more consequence—an accuracy and precision of method'" who knew how to do the "hard work that is needed to sift complex facts, identify the most important, and interpret them in the light of applicable rules and principles." In contrast, justification for the practicality of the Boston University program was more direct; it focused on the ability of students to combine the demands of clerking with late afternoon and evening classes and in the attempt of lecturers to offer "practical information; . . . while the theories of the law were ably expounded, the constant aim was to impart knowledge which would be of value in actual practice." Just which system was practical?

Part of the confusion over these rival claims can be eliminated by noting that in using "practical" all sides were really saying "good." Even more can be eliminated by noting that the combatants were reflecting a shift in understanding of what each called "legal science," the activity of determining what the law was and so how law was to be presented in litigation. For early nineteenth century lawyers legal science was the activity of ordering the "principles" of law—no man shall profit from his own wrong, first in time is first in right, equity follows the law—which were seen as being in a kind of dialectical relationship with the cases and which were the basis for legal argument. These principles provided the doctrinal underpinning for a world that was still ruled by the common law forms of action. In contrast, for late-nineteenth century lawyers legal science produced principles that were more closely related to the cases (though not

<sup>36.</sup> *Id*.

<sup>37.</sup> LAPIANA, *supra* note 34, at 102 (quoting Jeremiah Smith, Remarks, *in* HARVARD LAW SCHOOL ASSOCIATION, ORGANIZATION AND FIRST MEETING 36-40 (referring to meeting held on Nov. 5, 1886)).

<sup>38.</sup> LAPIANA, *supra* note 34, at 101 (quoting James Carter, Remarks, *in* HARVARD LAW SCHOOL ASSOCIATION, ORGANIZATION AND FIRST MEETING 25-28 (referring to meeting held on Nov. 5, 1886)).

<sup>39.</sup> Swasey, *supra* note 35, at 56-57.

<sup>40.</sup> The literature on "legal science" grows daily. In addition to LaPiana's book, one really ought to consult Thomas C. Grey, Langdell's Orthodoxy, 45 U. PITT. L. REV. 1 (1983); Robert W. Gordon, Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (Gerald L. Geison ed., 1983); Duncan M. Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought, 3 RES. IN L. & Soc. 3 (1980). My understanding of this topic has been immensely aided by discussion over the years with my colleague Fred Konefsky.

identical to the sum of the cases). These principles—consideration is detriment to the promisor or benefit to the promisee bargained for, to run with the land a covenant must touch and concern that land, to be actionable negligence must be the proximate cause of the injury complained of—explained the doctrinal categories that had replaced the forms of action as the organizing tool for legal thought.

The early nineteenth century sense of "principles" is the world of leading cases that survives in the *American Jurisprudence* series today; the later sense of "principles" is the world of full case reporting that thrives in the *West* key number system and on *WestLaw* and *Lexis*. The earlier is the world of the Boston University Law School's founders who felt that excessive concern with doctrinal detail was "technical" and so unnecessary; the later is the world of the great treatise and casebook writers at Harvard—Ames, Beale Gray, Thayer and Williston—and elsewhere. And in-between is Langdell, who discarded most of the cases because they were "useless and worse than useless," as would any early nineteenth century legal scholar searching for principle, but whose principles, like those of his contemporaries, were largely doctrinal.

Still, two questions remain: To what practice was either school's education practical? What was the theory implied by either's view of practical/practice? These questions are essential for understanding this dispute because "theory" and "practice," "theoretical" and "practical" are "pair" words. Each is parasitic on the other, draws its meaning from what the other is and is not. The law is full of such words—"law"/"politics," "public"/"private," "law"/"equity," "tort"/"contract," "negligence"/"strict liability." Each word in the pair relies on the other for help in defining the implicit boundary between the two. So to see practical value in the Harvard education as did Smith and Carter is to imply what proper theory is. But for the time being let us leave these questions and instead look at a battle in the early part of the twentieth century that bears on this question.

Fifteen years ago William Johnson wrote a history of the early years of legal education in Wisconsin.<sup>43</sup> The book concludes by focusing on disputes between the University of Wisconsin Law School, an old school but one of the earlier converts to Langdell's case method, and the upstart Marquette Law School. Marquette was anything but a convert to the case method. It started as a wholly part time, proprietary night school program based on text and lectures given by practicing lawyers. When its owners sold the school to Marquette in 1908, that university then began a day program and so the school acquired its first full-time faculty member, its dean. The Wisconsin faculty opposed Marquette's application for membership in the Association of American Law Schools and fought with the school over the diploma privilege, the right of a graduate to be admitted to practice without taking a bar exam. Wisconsin offered this right to its students and Marquette either wanted to obtain this right or deprive Wisconsin of it.

<sup>41.</sup> Christopher C. Langdell, *Preface to the First Edition, in A SELECTION OF CASES ON THE LAW OF CONTRACTS vii* (2d ed. 1889).

<sup>42.</sup> I know of no one who has used "pair words" but the root concepts are explained in Kennedy, supra note 40, and Gary Peller, The Metaphysics of American Law, 73 CALIF. L. REV. 1152 (1985).

<sup>43.</sup> WILLIAM R. JOHNSON, SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES (1978) [hereinafter Schooled Lawyers].

The precise, rather childish nature of these disputes is of no present importance. But it is interesting that both of the parties agreed that Marquette, which did not even offer degrees to its night school students, was the "practical" school. It advertised that the presence of its large corps of practitioner teachers made the "atmosphere more practical and less academic than is found in most law schools." By holding all of its day school classes in the morning it allowed students to "work and study in the afternoon," particularly in "law offices where they will acquire familiarity with the practical points of law." Wisconsin's dean agreed, though for him the appellation "practical" was more than a little pejorative. He found it important to note that Marquette did not stress techniques of legal reasoning and he denigrated "the sort of work they are doing there," because, among other things, he was "skeptical as to the extent to which practice can be taught in a law school."

Again, what can this dispute mean? What is practical about being taught by practitioners? What is wrong with a practical education? Clues to answering these questions can be divined. Again one sees "practical" being slung around as both an epithet—bad—and a merit badge—good—with little other content. However, here at least, unlike the dispute between Harvard and Boston University, there is agreement on where theory and practice lie, even if it is not precisely clear what each was. Elaborating on the story will help to clarify theory and practice.

At the same time that Wisconsin was fighting with Marquette, it was being harassed by a prominent member of the Wisconsin Board of Regents who explicitly wanted the school to offer more practical training. In response to this demand the school chose to offer "a course in drafting legal documents," described as one that would "compel the student to apply the principles of law in a concrete way that he has picked up in the various courses in School." Similarly the school saw as "practice courses" "19 hours of instruction in adjective law . . . . 4 hours of Common Law Pleading; 4 hours of Evidence; 4 hours of Code Pleading; 1 hour of Brief Making [research and writing]; and 2 hours of Office Practice [the drafting course]."

What was practical about common law pleading in a code pleading state? Or about an evidence course? Or even code pleading, the early twentieth century equivalent of civil procedure? In this litany, adjective law and drafting are seen as courses that are about the application of the principles of substantive law, however odd may be that understanding of procedure courses. Under this view, theoretical study is study of the substantive law, at least when sufficiently admixed with work on techniques of legal reasoning. This admixture was apparently important. At least during the diploma privilege controversy,

<sup>44.</sup> MARQUETTE UNIVERSITY SCHOOL OF LAW, CATALOG, quoted in SCHOOLED LAWYERS, supra note 43, at 136.

<sup>45.</sup> MARQUETTE UNIVERSITY SCHOOL OF LAW, ANNOUNCEMENT, *quoted in* SCHOOLED LAWYERS, *supra* note 43, at 138.

<sup>46.</sup> Statement by Harry S. Richards to Henry Bates (March 4, 1911), quoted in SCHOOLED LAWYERS, supra note 43, at 138.

<sup>47.</sup> Statement by Harry S. Richards to G.D. Jones (July 30, 1910), quoted in SCHOOLED LAWYERS, supra note 43, at 139.

<sup>48.</sup> Statement by Harry S. Richards to Clair B. Bird (November 2, 1914), quoted in SCHOOLED LAWYERS, supra note 43, at 139-40.

Wisconsin's lobbyist before the state's legislature denigrated schools without the privilege who, it was asserted, "would train for ability to pass the bar examination rather than to practice in fact." 49

In its emphasis on teaching "principles" of law and teaching techniques of legal reasoning, the Wisconsin faculty sounds like the Harvard faculty and its supporters twenty years earlier. Like Langdell's Harvard, the Wisconsin faculty advocated the case method because it trained students in how to practice law. It was the doctrinal structure of principles that the Boston University faculty thought to be too "technical" for the instruction of law students and that Holmes found to be too infused with "logic" (and thus too theoretical and so theological) and not enough with experience, as his famous aphorism goes.

Still, what was the "practice in fact" for which an avowedly non-practical education at Wisconsin was to prepare its students? It was the same practice that James Coolidge Carter had identified back at Harvard with his litany about sifting facts, identifying the most important, and interpreting them in the light of the "rules and principles." It was practice seen as law application, the world of litigation or adjective law, and the world of drafting pleadings and simple "legal" documents—if this is a will I must apply the Rule Against Perpetuities, The Rule in Shelley's Case and the Rule in Dumpor's Case and see that I corral the necessary number of witnesses.

It is particularly important to notice, because it is so puzzling, that it is not obvious that the theory taught at any of these four law schools prepared a student for a particular type of practice—although preparation to pass the bar exam should not be sniffed at, even though one ought to worry about admitting to practice anyone who needs three years of full time study for that exam. That there be an identifiable practice—large firm corporate, small town general, civil litigation, etc.—was less important to these law professors and their practitioner allies than that there be an identifiable theory, a body of knowledge—legal doctrine—that would support the professionalization project that to some extent both shared. It was this theory that then defined acceptable practice—rule application—consistent with the theory. While litigation was arguably the dominant activity of American lawyers, theory could complement actual practice. Litigation later became a less significant part of American practice as lawyers occupied the former province of notaries, real estate agents, and bank officers (which was claimed through campaigns directed at "unauthorized practice"), and as the absolute size of commercial entities and government regulation grew. During this stage, theory could be fudged, if necessary, and papered over with modestly useful skills such as drafting, brief writing, and research and case analysis.

Two largely contemporaneous events reinforce the importance of this understanding of theory and practice in law. At least one person understood that it was problematic to identify doctrinal exegesis, even at a quite rarefied level, with theory. Wesley Hohfeld's plan, or more accurately, vision, for a Vital School of Law and Jurisprudence was a paean to the importance of the law professor's professional vocation largely as the faculty at Harvard and Wisconsin would have seen it.<sup>50</sup> Still, Hohfeld's school for lawyers, as

<sup>49.</sup> Statement by C.B. Bird to Chairman of Assembly Judiciary Committee (April 15, 1915), quoted in SCHOOLED LAWYERS, supra note 43, at 147.

<sup>50.</sup> Wesley N. Hohfeld, A Vital School of Jurisprudence and Law: Have American Universities

opposed to his school for law professors and his school for citizens, sandwiched the doctrinal curriculum in between courses in office practice on the one hand and jurisprudence and legal history on the other. Yet, when it came time to act on Hohfeld's ideas the "leaders" of the bar and the law schools transformed Hohfeld's ideas into an enterprise that was neither a school for law professors nor a school for practicing lawyers, much less for citizens, but rather that quintessentially doctrinal oracle, the American Law Institute and its Restatement project.<sup>51</sup>

At about the same general time, the American Bar Association, disgruntled by the fact that despite its efforts to raise the standards of professional education, marginal schools were proliferating while the better types of law schools were barely holding their own, induced the Carnegie Foundation to undertake a study of legal education.<sup>52</sup> Carnegie was selected because its report on medical education, known as the Flexner Report after its author Abraham Flexner, had been extremely successful in attacking and ultimately leading to the closure of the more marginal medical schools. The Carnegie study of legal education was undertaken by Alfred Z. Reed, a non-lawyer staff member. Reed visited dozens of law schools. From these visits he concluded that since there were really several legal professions arrayed between the extremes of major corporate practice and local service for the middle and lower middle class, there ought to be various types of law schools with varying types of curricula, not just schools like Wisconsin, but also schools like Marquette and proprietary schools where law was treated much like a trade as well.<sup>53</sup> The ABA, like Victoria, was not amused. In its response it stated:

In spite of the diversity of the human relations with respect to which the work of lawyers is done, the intellectual requisites are in all cases substantially the same. . . . All require high moral character and substantially the same intellectual preparation.<sup>54</sup>

Variations in practice settings or even clientele were unimportant. What was important was the homogenous center of doctrinal education.

A brief discussion of three events between the World Wars involving prominent members of the realist movement seems sensible before returning to the MacCrate Report. Realism has been blamed and praised for all sorts of things, generally both and for the same things. Most known for their attacks on the nineteenth century doctrinal universe of certain, "logically" derived doctrine, at least some of the realists questioned related aspects of legal education. Most famous of these questionings is that of Jerome Frank who asked, Why Not a Clinical Lawyer School? This article is usually seen as the precursor of contemporary clinical education, though clinic-like studies date back to 1893

Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?, in Association of American Law Schools, Handbook and Proceedings 76 (1914).

<sup>51.</sup> N.E.H. Hull, Restatement and Reform: A New Perspective on the Origins of the American Law Institute, 8 L. & HIST. REV. 55 (1990), sets out the basic story.

<sup>52.</sup> STEVENS, *supra* note 31, at 112-23 tells this story well.

<sup>53.</sup> STEVENS, *supra* note 31, at 113-14.

<sup>54.</sup> Stevens, *supra* note 31, at 116 (quoting Arthur L. Goodhart, Essays in Jurisprudence and the Common Law (1931)).

<sup>55. 81</sup> U. Pa. L. REV. 908 (1932).

and were more fully developed by others, even in the thirties. Yet, it is particularly interesting how Frank's article participated in the world that it criticized. Its central prescription was a push to send students into trial courts to observe the fact-finding process as an antidote to the appellate opinion-centered class room. In fact, Frank's idea had an even more radical potential: Underhill Moore suggested that if the idea were to be taken seriously then the law schools should be shut down for a generation while the law professors learned something about practice.<sup>56</sup>

Walter Wheeler Cook followed through on Hohfeld's ideas about the need for real theory in legal education, developing a course for law students that explored scientific method and legal reasoning.<sup>57</sup> The point of Cook's course was to suggest that "legal science" was no such thing and that legal reasoning was not an exercise in logic. Traditional law teachers reacted in horror. Wisconsin's dean was "rather skeptical of the benefit which... students got out of" the course because "[t]he list of readings suggested seems a greater burden than their immature shoulders can bear." Rather than engaging in such studies students should spend time preparing "to practice law as it is practiced, to know the principles that are being daily applied in our courts." Roscoe Pound and Joseph Beale of Harvard found the course to be useful for law teachers and "older" students, but surely agreed with William Draper Lewis, Dean at Pennsylvania and Executive Director of the American Law Institute, who was "fearsome" that "the man who comes to the law school, and wants to be turned out in three years a reasonably good lawyer... may not arrive where he wants to arrive" should he begin with Cook's course.<sup>60</sup>

Last and most significant is a piece by Karl Llewellyn, On What Is Wrong With So-Called Legal Education,<sup>61</sup> the text of a speech given to a group of Harvard law students, apparently as part of the 1935 student evaluation of the Harvard curriculum during the curriculum study of that year. While the students in their later evaluation attacked the case method as well as the overall blandness of the curriculum,<sup>62</sup> Llewellyn attacked something more fundamental. He asserted that legal education was "blind, inept,

<sup>56.</sup> Statement by Underhill Moore to Jerome N. Frank (January 5, 1934) (Underhill Moore Papers, Sterling Memorial Library, Yale University). "My chief difference with you is that I doubt very much whether a law school has at present anything very substantial to offer the student of law. I should put the beginning student in an office and give the law professors a generation to get something to put in the curriculum of your 'Clinical Lawyer School." *Id.* 

<sup>57.</sup> The course is described in Walter Wheeler Cook, *Modern Movements in Legal Education, in* ASSOCIATION OF AMERICAN LAW SCHOOLS, HANDBOOK AND PROCEEDINGS 40-46 (1928).

<sup>58.</sup> Harry S. Richards, Remarks, in Association of American Law Schools, Handbook and Proceedings 49 (1928).

<sup>59.</sup> *Id*.

<sup>60.</sup> William Draper Lewis, Remarks, *in* Association of American Law Schools, Handbook and Proceedings 55 (1928).

<sup>61.</sup> Karl N. Llewellyn, On What is Wrong with So-Called Legal Education, 35 COLUM. L. REV. 653 (1935).

<sup>62.</sup> ARTHUR E. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967 at 284 (1967).

factory-ridden, wasteful, defective and empty"<sup>63</sup> and offered as his ground for saying so this aphorism, "Not rules, but doing is what we seek to train students for."<sup>64</sup> How far such a conception was from intelligibility for most law teachers can be seen from the fact that though the reaction to realism in the thirties was at time vituperative, none of the critics even bothered to respond to Llewellyn's attack.

After this brief, episodic review of some points in the history of American legal education it ought to be possible to identify a certain continuity. For over a hundred years now the legal profession has seen as theory the substance and manipulation of doctrine, and as practice the application of that substance. Attempts to alter that identification by asserting the relevance of a different kind of theory—as Cook did directly and Hohfeld indirectly—will be attacked or normalized just as suggestions that practice is not law application—as Llewellyn did or as Moore believed Frank did—will be ignored or, worse, deflected into safely canonical innovation. And for over seventy years the profession has denied the fragmentation of legal practice with the same transparently flimsy argument to the effect that no matter what kind of law a lawyer practices, that lawyer needs the same base of legal knowledge and skill. The only redeeming feature of these assertions is their fit with the structure for the maintenance of professional privilege and autonomy that is the professionalization project. Asserting that all lawyers need to know both theory—identified with the "core" of knowledge that makes law a definable field—and practice—identified with the skill of law application, the mysterious ability to reason "legally" that one can only acquire through legal education—the basis for a claim of professional autonomy is at least formally secure.

I do not mean to be heard to claim that the referends for "theory" and "practice" have been the same for over one hundred years. Change in detail often comes while function stays the same. Theory is no longer the grand doctrinal edifices pieced together with logic that the late nineteenth and early twentieth century knew, though contemporary law and economics in its most imperial mode erects faintly reminiscent structures. Indeed, today theory is more fragmented than it was in even the fifties and sixties when legal process style policy analysis presented law as a neatly mowed lawn. And as the list of skills in the MacCrate Report shows, over the past fifty years there has been a shift on the practice side from a more to a less litigation centered view. More notable than this, however, is the shift of legal reasoning from being seen as "theory," as it was at Wisconsin, to "practice." Such a shift is the ultimate tombstone for "thinking like a lawyer," the late nineteenth and early twentieth century patch to the intellectual structure of professionalism necessitated by the choice to offer elective courses in the second and third year of law school. That choice undercut the claim that lawyers possessed expertise in a definable sphere of knowledge by making it obvious that to some extent it made little difference what courses a student took. Now, an undefined "core" of legal knowledge, itself a somewhat cynical compromise accreditation requirement agreed to by the law schools about the time that they were fighting off moves toward both a required curriculum along the line of Indiana's and a required clinical experience, seems to be an

<sup>63.</sup> Llewellyn, supra note 61, at 653.

<sup>64.</sup> Llewellyn, supra note 61, at 654.

<sup>65.</sup> The phrase seems first to emerge in the literature from the mouth of James Barr Ames. See ASSOCIATION OF AMERICAN LAW SCHOOLS, HANDBOOK AND PROCEEDINGS 16 (1907).

adequate patch, since at least it has the virtue of being a good, if indistinct, fit with the relevant hole.

The conclusion that if doctrine is theory then skills must be practice is nevertheless anything but obvious. Why this is so can best be approached by noting that the structure on the skills side is more than a little odd. It is hard to see how the skill of "problem solving" and the skill of "legal analysis" can properly be seen as being on the same plane. It is as if one were designing a chef's school and put meal planning and plate garnishing or vegetable sautéing on the same level. Indeed, it is this classic category mistake, reminiscent of Borges, 66 that got me interested in the MacCrate Report in the first place, that got me to see it as more than another attempt to upgrade clinical education and so give deans fits.

I doubt that one can really paper over the difference in the level of generality between the skill of problem solving and that of legal analysis by saying, as does the MacCrate Report, that both are analytical. Consider—I have a client who needs a zoning variance. I can solve this problem by bribing the members of the zoning board, or by buying off any neighbors who might object to the variance on the assumption that the board is asleep unless awakened, or by assembling a group of local heavy weights to testify as to the importance of the project to the community, or by concocting an argument as to why the variance is appropriate under the zoning ordinance. All of these are examples of problem solving. Only the last involves any semblance of legal analysis unless one wants to stretch that concept to understanding that bribery is criminal and thus better be done carefully or that neighbors may have a right to object or that testimony may be given. Indeed, one can find those facts in a *League of Women Voters*' handbook on local government, and stated there with far more clarity than in the statues of any state. Thus, it is far more plausible to see problem solving as the master skill of lawyers to which legal analysis is a subordinate skill.

Now, I do not wish to be heard to argue that legal analysis is never central to the solution of a client's problem. In appellate work it is often central, so too in some kinds of government practice. And it was legal analysis that solved the problem of coordination of multiple small producers in a rapidly growing market by creating the business trust in the nineteenth century and, when that device proved to be unsatisfactory, the modern corporation. But centrality to solution does not make a skill fundamental. Appellate practice always centers on the question, "How can I get this court to reverse (or affirm) a matter considered once by a presumptively competent human?" Solving that problem may call for much or little legal analysis, much or little factual analysis, and occasionally even casting aspersions on the decision maker. Problem solving skills—collecting a wide range of information about legal doctrine, social institutions, customary ways of doing things and the strengths and weaknesses, including the financial capacities, of the parties and associated participants and then constructing and weighing alternatives—is the root skill to this or any other variety of practice. It is problem solving skills (or their lack) that allow a lawyer to say, "This is just another house closing," or "This is just a slip and fall," or "This business just needs a standard corporate charter"; and it is problem solving skills (or their lack) that turn those problems into complicated questions of unacknowledged

<sup>66.</sup> See Robert Darnton, The Great Cat Massacre and Other Episodes, in FRENCH CULTURAL HISTORY 191-92 (1984).

easements, defective products or complicated shareholder agreements funded with key person life insurance. It is thus problem solving that is common to all of the various parts of the legal profession that the Task Force so lovingly describes.

If the MacCrate Report is this wrong in its categorization of skills, in seeing problem solving and legal analysis as skills on the same plane, then I believe that its entire edifice falls. The recognition that problem solving is the pre-eminent skill reduces not just legal analysis but also substantive legal knowledge to a subordinate position. So reconfigured, one has no clean theory to set against and inform practice, only a practice with many subordinate bodies of knowledge and kinds of skills. Yet, I believe that while the Report fails in its attempt to offer a structure sufficient to bridge the "gap" that it sees between legal education and legal practice, one might develop a way of conceptualizing the relationship of theory and practice in law that seems better to fit with what practicing lawyers do and thus might be the basis for a better bridge.

To flesh out that alternative conceptualization, one might start by noticing that, if we train law students for doing—as Llewellyn asserts and that I must assert is the only activity that all of the varieties of legal practice so lovingly chronicled by the MacCrate Report have in common—then How To Do Things With Rules, 67 to steal William Twining's wonderful title, is only one of a list of theories—general explanations of the recurrent aspects of or patterns to a set of practices or institutions—that are relevant to understanding legal practice. Consider some others—how to do things with documents; how to do things with procedures; how to do things with private institutions; how to do things with public agencies. At the other extreme one can identify real legal practices: large corporate, small corporate, litigation, real estate. And in between are topics like rules for doing things with economic enterprises, rules for doing things with family life, rules for doing things with public agencies, rule for doing things in disputes between strangers, and rules for dealing with adjudicating agencies as well as equally substantive, but hardly doctrinal, topics like economic institutions, families in their many guises, public agencies in their many forms, disputing among strangers and judges, and the institutional practices of courts.

Such a schema would have several advantages. It would recognize, as Hohfeld did, that legal doctrine, no more than a schematic understanding of social institutions, was neither theory nor practice, but a knowledge base that is necessary for theory to produce a practice and for practices to generate theories. It would undermine the silly notion that skills are contextless and that contexts are transparent and so never need to be discussed in law schools. It would eliminate the truly divisive notion that there are substantive law teachers and there are clinical skills teachers, a notion that, because theory is always more important than practice in academic life, both guarantees that clinicians will always be second class citizens and that they will endlessly try to climb out of their low estate by developing "theories" about the skills that they teach, theories that will always be seen and dismissed as simple-minded by the substantive law teachers. It would expose students to actual practices of law so that they might sample them and thus make slightly more intelligent decisions when seeking employment. Even more importantly it might bring a modest decline in the alienation and anomie of law students—a large decline is

<sup>67.</sup> WILLIAM TWINING & DAVID MIERS, HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION (3d ed. 1991).

impossible; still being in school at twenty-five or twenty-six is a real bummer. For, instead of presenting students with an endless line of identical, seemingly only modestly relevant courses each asking the same two questions—Can you endure intense boredom? Can you learn this "crock" in less time and with less effort than the last "crock"?—law school might actually help students to see the coherence of a real practice emerge before their eyes and so to gain a sense that having seen one they might learn another. The faculty too might profit. The dispirited routine of doctrinal scholarship, fully as incoherent as Pierre Schlag says it is<sup>68</sup>—an endless row of doll house tea pots, each fully capacious for the tempest thereof—might be replaced with the exploration of the activities of people doing things in a world that was alive with possibilities. It might even make cranky, cash-starved deans for whom the equation "skills = clinic = gobs of money per student"<sup>69</sup> a bit less cranky, for problem solving does not necessarily imply clinic; indeed it may imply a case method much more like the traditional case method in business schools. And it is all more than a little implausible.

Why implausible? Because of all the observations about professional identity and its formation that seem to be irrelevant to the MacCrate Report but are absolutely essential to it. There is nothing particularly legal about problem solving. How does one maintain the distinctiveness of being a lawyer if problem solving is the core of that identity? How does any plausible theory about problem solving define an identifiable sphere of knowledge separate and distinct from the knowledge of other social actors? After all, plumbers solve problems, physical therapists solve problems, landscape architects solve problems and what to serve for dinner is the classic problem that gets solved in every household, at least most nights. Making dinner out of what is left over in the refrigerator is a high level skill, but not likely a high paying one. If one does not need a high-powered professional to solve problems, why pay lawyers large amounts of money? And the most plausible answer to that question—"You pay me a large amount of money to solve your problem because the law says I have a monopoly here"—lurches perilously close to river piracy, an attitude not likely to garner much social support for the continuance of professional privilege.

However silly concerns like these about constituting and justifying a professional identity may seem, and they do seem silly—fully grown adults worrying about turf like movie gangsters and about embarrassment like a newly toilet-trained child—they are absolutely crucial to the professional project that is an organization like the American Bar Association. Thus one can understand the attraction for the Task Force of its neat division of law into theory and practice. Let me say it again; it is the doctrine taught in the law schools that identifies a distinct sphere of knowledge for the legal professional, the separateness of which is supported with the notion that there are distinctly legal skills that lawyers need to know. So, burying the skill of problem solving in an inappropriate place may be intellectually incoherent, but at least it is sensible. It solves a problem, as it were.

The conclusion that it is important, damn important, that there be a distinctively legal sphere of action receives unexpected and probably unintended support from a recent

<sup>68.</sup> Pierre J. Schlag, Normativity and the Politics of Form, 139 U. Pa. L. Rev. 801 (1991); Pierre J. Schlag, Normative and Nowhere to Go, 43 STAN. L. Rev. 167 (1990); Pierre Schlag, Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction, 40 STAN. L. Rev. 929 (1988).

<sup>69.</sup> See Costonis, supra note 5, for a good example of the species.

article by Bryant Garth and Joanne Martin. In what is a superb piece of research, they report survey data about the skills and knowledge new attorneys feel they need in practice and where these young attorneys acquire both.<sup>71</sup> The data show the traditional separate spheres of practice, rural and small firm city practitioners being more alike than small firm and large firm city lawyers. 72 They also show how relatively unimportant knowledge of substantive law is and how much law is a matter of writing and speaking and of instilling others with confidence in oneself and only thereafter a matter of legal reasoning or legal drafting.<sup>73</sup> Yet in evaluating the data, Garth and Martin constantly focus on the distinctively legal: "the practical, but not particularly legal, skills of oral and written communication,"<sup>74</sup> "the teaching of negotiation—or better stated, legal negotiation."<sup>75</sup> They assert that "[a]bility in legal reasoning remains the centerpiece of legal education," an obvious point, but, despite their evidence to the contrary, they find it necessary to conclude their assertion with "and even legal practice." And finally they conclude that "the crucial importance of legal reasoning every step of the way is the key to defining the legal profession,"<sup>77</sup> a proposition nowhere supported by their data. They even note the importance of "the knowledge produced by academics within the domain of law" and observe "ambitious" law professors want to do "legal scholarship, not merely teach practical skills."<sup>79</sup> And these are good social scientists, not unreflective bar types.<sup>80</sup>

- 70. Bryant G. Garth & Joanne Martin, Law Schools and the Construction of Competence, 43 J. LEGAL EDUC. 469 (1993).
  - 71. *Id*.
  - 72. Id. at 476-77.
  - 73. Id. at 473-75.
  - 74. Id. at 502.
  - 75. Id. at 505.
  - 76. Id. at 503.
  - 77. Id. at 509.
  - 78. Id. at 507.
  - 79. Id. at 504.
  - 80. One of the authors replies, "in the spirit of playfulness of the article":

I am surprised that you think what we wrote was unintentional. We carefully thought out each of those statements, which are not at all meant to celebrate some "distinctively legal sphere." The point we made, which your paper seems to agree with one hundred percent, is that the activities of the legal profession and of course, although you do not say it, the legal academy, depend on their ability to make problem solving, negotiation, writing, reasoning, talking, etc., part of their "expertise," which is of course socially constructed out of the institutions that currently comprise the legal profession. What is striking about the success of negotiation in law schools is that it could not succeed in law schools—as a matter of the sociology of the legal profession—until academics who (knowing they must write "legal theory") succeeded in "making it theoretical and legal." If I dare say so, your analysis of problem solving as "using rules and many other things" fits perfectly. Lawyers and law professors seem even in their light criticism to assume that problem solvers must "use rules" even if to know when not to use them, thereby contributing to the view that problem solvers ought to be "expert in legal rules" or at least ought to legitimize the rules produced by lawyers by "taking them into account."

Statement by Bryant Garth to John Henry Schlegel (Sept. 8, 1994) (on file with author).

So why did I bring this all to you at this time of celebration? My reason is simple, if not particularly appropriate for a guest. Simply surviving, getting older one year at a time, like every other law school, is not an obvious cause for celebration in these less than satisfying times. The MacCrate Report extends to you a seemingly enticing prospect—better practicing lawyers in a more value-sensitive practice. Will you accept the offer? I hope that my pointillistic foray into the history of American legal education will have convinced you that, while no means snake oil, the offer is best described by the sign over my daughter's desk—"SSDD, Same Shit, Different Day." The MacCrate Report is, as we used to say, not part of the solution, but part of the problem, a problem older than this law school.

At the same time rejecting the offer and traveling down another road, a road like the one I have sketched out, away from understanding law practice as rule application and toward law practice as problem solving using rules and many other things, should be done with caution. Should the idea have even momentary appeal, remember that I have outlined for you a reverse Faustian bargain. You get to keep, if not your soul, at least a coherent notion of what it is to be a lawyer, law professor or law student in exchange for your claim to social deference and the potential of earning a whole lotta cash! Are you ready to give up your professional identity and, as it were, run naked through the streets? If nakedness is at all attractive, remember what a good buddy of mine said to me a while ago: "Before you run naked through the streets, Schlegel, check the statutes to be sure they haven't criminalized unnecessary ugliness." To return to my original metaphor, do you have the courage to clear cut all those old oaks so that after planting seedlings and patiently tending them for a generation or so the students and faculty, like spotted owls, may thrive?

While you think about nakedness and chain saws—think of it as a video at your local rental outlet on the shelf next to my absolutely favorite title, "Buck Naked Country Line Dancing"—I should mention that I will think no less of you if you choose some watered down version of MacCrate's prescriptions. I don't own a chain saw dealership in Indianapolis and I ain't about to buy one.



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## **NOTES**

# MEDICAL MALPRACTICE ACTS' STATUTES OF LIMITATION AS THEY APPLY TO MINORS: ARE THEY PROPER?

SCOTT A. DEVRIES\*

#### INTRODUCTION

Kimberley Kay Rohrabaugh was separately treated and diagnosed by G. W. Wagoner, M.D., and J. Like, D.O., for a growth at her waistline. Rosa Rohrabaugh Cross brought suit as next friend for medical malpractice. The health care providers pleaded a statute of limitation defense pursuant to Indiana's Medical Malpractice Act of 1975. The specific provisions required children between six and twenty-one years of age<sup>3</sup> to comply with a two-year statute of limitation on medical malpractice claims. Children under six years of age had until their eighth birthday to bring a medical malpractice claim. In Rohrabaugh v. Wagoner, the Indiana Supreme Court held that the statutes violated neither Indiana's Due Course of Law Provision nor the Equal Protection Provisions of the State and the Federal Constitutions.

- \* J.D. Candidate, 1995, Indiana University School of Law—Indianapolis; B.B.A., 1981, Western Michigan University. The author wishes to thank Henry Karlson, Professor of Law, Indiana University School of Law—Indianapolis, for his invaluable assistance and insight in developing this Note's topic and themes. This Note reflects one of Professor Karlson's primary concerns and goals—the improvement of children's mental, physical and spiritual well-being.
  - 1. Rohrabaugh v. Wagoner, 413 N.E.2d 891 (Ind. 1980).
- 2. *Id.* at 892; Act of Apr. 17, 1975, Pub. L. No. 146-1975, 1975 Ind. Acts 854 (codified as amended at IND. CODE §§ 16-9.5-1-1 to -10-5 (1988) (repealed 1993); current versions of §§ 16-9.5-3-1, 16-9.5-3-2 at IND. CODE ANN. §§ 27-12-7-1, 27-12-7-2 (West Supp. 1994).
- 3. Rohrabaugh, 413 N.E.2d at 894. At that time the age of majority in Indiana was twenty-one years of age.
  - 4. IND. CODE ANN. §§ 27-12-7-1, 27-12-7-2 (West Supp. 1994); IND. CODE § 34-4-19-1 (1988).
  - 5. Ind. Code Ann. § 27-12-7-1.
- 6. IND. CONST. art. I, § 12. "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." *Id*.
- 7. U.S. CONST. amend. XIV, § 1; IND. CONST. art. 1, § 23; Rohrabaugh, 413 N.E.2d at 895. U.S. CONST. amend. XIV, § 1 provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. IND. CONST. art. I, § 23 provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Id.

Part I of this Note discusses the perceived medical malpractice insurance crisis of the mid-1970s, including various viewpoints concerning whether a crisis actually existed. It also covers the various enactments by state legislatures and examines whether those laws had any effect on the perceived crisis, and focuses particularly on the statutes of limitation that apply to minors. Part I also explores the types of approaches that courts utilize to resolve constitutional challenges to the statutes. Part II analyzes decisions of the Indiana Supreme Court in the area of limitations of actions as applied to minors. Part III examines federal as well as various states' supreme court rulings on constitutional challenges to statutes of limitation for minors. Part IV analyzes a relatively new federal statute, heretofore unapplied to this subject matter. This Note concludes with observations and recommendations for possible changes to Indiana's medical malpractice statute of limitation for minors.

#### I. BACKGROUND INFORMATION

## A. Limitations of Actions

Indiana's medical malpractice limitation of action is, in effect, a statute of limitation, rather than a different type of limitation of action. A statute of limitation bars a claim unless it is brought within a specified period after the claim or right arises. A statute of limitation is intended to:

[P]romote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.<sup>9</sup>

The defense of laches is different from a statute of limitation defense. A statute of limitation, unless otherwise provided by law, applies only to legal actions whereas the doctrine of laches applies only to suits in equity.<sup>10</sup> A statute of limitation defense requires merely the passing of the prescribed time period. In contrast, the laches defense requires an additional showing that the lapse of time may prejudice the defendant or some other person.<sup>11</sup>

A statute of limitation also differs from a statute of repose, which "terminates any right of action after a specific time has elapsed, regardless of whether there has as yet

<sup>8.</sup> BLACK'S LAW DICTIONARY 639 (6th ed. 1991) [hereinafter BLACK'S].

<sup>9.</sup> Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944). See U.S. v. Kubrick, 444 U.S. 111, 117 (1979) (The general purpose of a statute of limitation is "to encourage prompt presentation of claims."); see also The Act of Limitation of a Proviso, 32 Hen. 8, c.2 (1540) ("Forasmuch as the Time of Limitation appointed for suing . . . extend, and be of so far and Long Time past, that it is above the Remembrance of any living Man, truly to try and know the perfect Certainty of such things, as hath or shall come in Trial . . . to the great Danger of Men's Consciences that have or shall be impanelled in any Jury for the Trial of the same . . . .").

<sup>10. 51</sup> AM. JUR. 2d Limitation of Actions § 6 (1970).

<sup>11.</sup> *Id*.

been an injury."<sup>12</sup> A statute of limitation controls the time within which a claim must be filed after the cause of action arises. A statute of repose limits the time within which a claim can be filed and is not related to when the cause of action arose, nor whether the injury was even discovered.<sup>13</sup>

Indiana's medical malpractice limitation of action for minors is a statute of limitation.<sup>14</sup> The Indiana Supreme Court has stated that the Medical Malpractice Act's statute of limitations is "an 'occurrence' statute," which means that the period of limitations "begins to run on the date of the alleged malpractice."<sup>15</sup> However, according to the doctrine of continuing wrong, if the entire course of medical conduct combines to produce injury, the time period does not begin to run until after the wrongful course of conduct ceases.<sup>16</sup> In addition, "[t]he doctrine of fraudulent concealment estops a defendant from asserting a statute of limitations defense when that person, by deception or violation of a duty, conceals material facts from the [patient] to prevent discovery of the wrong."<sup>17</sup>

A national study of 48,550 medical malpractice claims resolved between 1985 and 1989 revealed that twenty months was the average time that elapsed between an incident's occurrence and its being reported to the malpractice insurance company.<sup>18</sup> However, in ten percent of the claims the time lapse was three years.<sup>19</sup> Thus, these claims would be barred by "occurrence statutes."

- 12. BLACK'S, supra note 8, at 639.
- 13. 54 C.J.S. Limitations of Actions § 4 (1987).
- 14. See Jones v. Cloyd, 534 N.E.2d 257, 259 (Ind. Ct. App. 1989) (stating that the "discovery rule" did not apply to medical malpractice statute of limitations, and that the limitation period began to run from the date of the alleged act, omission or neglect).
- 15. Havens v. Ritchey, 582 N.E.2d 792, 794 (Ind. 1991); see Hepp v. Pierce, 460 N.E.2d 186, 190 (Ind. Ct. App. 1984).
- 16. O'Neal v. Throop, 596 N.E.2d 984, 987 (Ind. Ct. App. 1992). The doctrine of continuing wrong works more to the detriment of a patient's family doctor than to the detriment of a patient's surgeon because family doctors maintain long term relationships with their patients. In contrast, surgeons usually perform medical services on a patient in isolated instances. Thus, family doctors' length of exposure to liability is longer than that for surgeons.
  - 17. Id. at 988. Furthermore, the court stated that:

When the physician-patient relationship terminates, the constructive fraud terminates and the statute of limitations begins to run. The statute of limitations also begins to run when the patient learns of the malpractice or discovers information that would lead to discovery of the malpractice with the exercise of reasonable diligence.

#### Id. (citations omitted).

18. Data Sharing Committee, Physician Insurers Ass'n of America, Data Sharing Reports, Cumulative Reports, January 1, 1985-June 30, 1989 (1989), as cited in, Office Technology Assessment, Impact of Legal Reforms on Medical Malpractice Costs 25 (1993) [hereinafter "Assessment"].

19. *Id*.

## B. Medical Malpractice Statutes

1. The Perceived Crisis.—In the 1970s, many persons perceived a "crisis in the cost and availability of medical malpractice insurance for health care providers." The number of claims filed, the average amount awarded, and malpractice insurance premiums rose significantly between 1970 and 1975. Medical malpractice statutes were passed based upon assumptions that: (1) increased insurance premiums created a lack of available affordable liability insurance; (2) there is a close nexus between substantive tort law, the tort litigation process and the insurance industry's decisions regarding the availability and the price of such insurance; and (3) placing restrictions on the tort liability system will effectuate a reduction in insurance premiums resulting in an increase in reasonably priced insurance.<sup>22</sup>

These assumptions are highly debated.<sup>23</sup> For instance, the insurance crisis of 1974 to 1976 is not supported by well-documented insurance statistics because very few existed.<sup>24</sup> Also, many of the medical malpractice statutes have very limited legislative history with no clear documentation to support these assumptions.<sup>25</sup> Some states were not even experiencing significant health care insurance problems.<sup>26</sup> Ralph Nader charges that the tort reform movement was an "unprincipled public relations scam" engineered by the

20. Eleanor D. Kinney et al., Indiana's Medical Malpractice Act: Results of a Three-Year Study, 24 IND. L. REV. 1275, 1276 (1991). See generally Richard C. Turkington, Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?, 32 VILL. L. REV. 1299 (1987). During the course of a December 15, 1976, round table discussion established to gather information on the causes and cures of the medical malpractice dilemma, Otis R. Bowen, M.D., Governor of Indiana, stated:

It has become a crisis issue simply because of the number of suits brought against health care providers. . . . The crisis itself is caused by two facts relating to malpractice insurance: the premium cost to the physician has gone way up, and many companies have quit writing malpractice insurance. The cost of the insurance may be a lesser factor than availability, which has forced many physicians to give up their practice.

THE MEDICAL MALPRACTICE CRISIS 2 (American Enterprise Institute for Public Policy Research, Washington D.C. ed., 1977) [hereinafter "Round Table"].

- 21. See generally Kinney, supra note 20 (discussing the pertinent numerical data and associated problems); IND. MED. MALPRACTICE STUDY COMM'N, FINAL REPORT OF THE MEDICAL MALPRACTICE STUDY COMM'N 5-6 (1976); FRANK A. SLOAN ET AL., INSURING MEDICAL MALPRACTICE 4-6 (1991).
- 22. Symposium, Tort Reform: Will it Advance Justice in the Civil System? 32 VILL. L. REV. 1211, 1212-13 (1987) [hereinafter "Symposium"].
- 23. Gail Eiesland, Miller v. Gilmore, *The Constitutionality of South Dakota's Medical Malpractice Statute of Limitations*, 38 S.D. L. Rev. 672, 687 & n.128 (1993) (The author stated that "[t]he validity and severity of the medical malpractice insurance crisis of the 1970's has been seriously questioned by some, and solid explanations for the varying rates of medical malpractice insurance claim frequency over the last twenty-five years are not available.").
  - 24. SLOAN, supra note 21, at 4.
  - 25. SLOAN, supra note 21, at 4.
  - 26. SLOAN, supra note 21, at 4.

insurance industry to recoup losses resulting from cyclical downturns in interest rates.<sup>27</sup> Some critics state that the major causes of the perceived crisis included a poor economy which caused insurance company investment losses, unexpected increases in the frequency and award size of malpractice claims, and increases in physician error, as well as increases in the possibility of mistakes from using advanced medical technology.<sup>28</sup>

Other analysts, claiming that the crisis was real, blame the increased insurance costs and lack of insurance availability on: (1) tort law and its broadened concepts of liability; (2) an increase in litigation; and (3) large damage awards which caused unpredictable and unmanageable award payments.<sup>29</sup>

In an article about the cause of the medical malpractice crisis, one author commented that "[m]any of the insurance companies' problems [could] be traced to the long-tail of medical malpractice." The term "long-tail liability" refers to the long term exposure to liability of certain groups. Extended statute of limitations periods, the discovery rule and the doctrine of continuing wrong create long-tail liability because they allow for an extended length of time between the medical treatment or care and the final disposition of all claims resulting from that treatment or care. Thus, insurance companies increase premiums to compensate for the additional risk created by long-tail liability. Another author asserts that "[a]s a result of the discovery rule and the [doctrine of continuing wrong], the number of medical malpractice plaintiffs expanded substantially. This author further states that both the insurance industry and the medical profession blame the insurance crisis in large part on this expansion. However, as noted in *Kenyon v. Hammer*, eighty-eight percent of all medical malpractice claims are reported within two years of the injury; thus, long-tail liability caused by the discovery rule is not a significant factor in determining medical malpractice insurance rates.

Changes in medical malpractice insurance policies have alleviated long-tail liability problems. Medical malpractice policies are unique because they provide two types of

<sup>27.</sup> Ralph Nader, *The Corporate Drive to Restrict Victims' Rights*, 22 GONZ. L. REV. 15, 18 (1987). See Turkington, *supra* note 20, at 1299-1300; *see*, *e.g.*, Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983) (The court took judicial notice that a medical malpractice insurance crisis did not exist.).

<sup>28.</sup> See Eiesland, supra note 23, at 685-86 & nn.121-22.

<sup>29.</sup> Symposium, supra note 22, at 1214.

<sup>30.</sup> Milton S. Blaut, *The Medical Malpractice Crisis—Its Causes and Future*, 44 INS. COUNS. J. 114, 119 (1977) (This article also includes information about the process used by actuaries to compute insurance rates.).

<sup>31.</sup> See Eiesland, supra note 23, at 686 & n.124 (discussing the affect of occurrence policies and claims-made policies on long-tail liability and actuarial uncertainty).

<sup>32.</sup> Nancy E. Leibowitz, Statute of Limitations—Medical Malpractice—Constitutional Law—Five Year Statute of Repose on Medical Malpractice Claims That Commences When an Injury Occurs Is Constitutional; Hill v. Fitzgerald, 304 Md. 689, 501 A.2d 27 (1985); 16 U. BALT. L. REV. 571, 574 (1987). See Eiesland, supra note 23, at 686.

<sup>33.</sup> See Leibowitz, supra note 32, at 574-75.

<sup>34.</sup> Leibowitz, *supra* note 32, at 574-75.

<sup>35.</sup> Leibowitz, supra note 32, at 574-75.

<sup>36. 688</sup> P.2d 961 (Ariz. 1984).

<sup>37.</sup> Id. at 978; see supra text accompanying note 18.

"coverage forms: occurrence policies and claims-made policies. Occurrence policies provide coverage for all claims that arise from a given accident year, regardless of when the claim is reported. Claims-made policies . . . provide coverage only for claims reported during the policy year." Occurrence policies transfer risks to the insurer from the physician at the time of the occurrence of the alleged negligent act, but claims-made policies transfer the risk at the time the insurer receives the report or claim of the alleged negligent act. Actuarial uncertainty is lessened because claims-made policies only cover those claims that are reported during the time that the medical malpractice insurance policy is in effect. Thus, the switch that occurred during the 1970s from occurrence policies to claims-made policies helped to mitigate the long-tail problems.

2. The Legislative Responses.—The states have authority to regulate medical malpractice because tort law traditionally falls under state domain,<sup>42</sup> and regulation of both insurance, per the McCarran-Ferguson Act,<sup>43</sup> and medical practice are primarily state responsibilities.<sup>44</sup>

The typical state statutes enacted to meet the perceived crisis included:

- (1) pretrial screening panels;
- (2) caps or other restrictions on non-economic and punitive damages;
- (3) regulation of attorneys' fees;
- (4) alternatives to lump-sum payment of damage judgments such as periodic payments;
- (5) abolition or restriction of the collateral source rule;
- (6) selective restriction on statutes of limitation and alterations of related concepts such as the discovery rule and
- (7) restriction on joint and several tort liability.<sup>45</sup>
- 38. Curt W. Fochtmann et al., *Insurance Tax Policy and Health Care Reform: Back to the Future*, 50 WASH. & LEE L. REV. 565, 583 (1993) (As indicated by the language, claims-made policies also cover acts occurring prior to the stated policy year, but are reported during the policy year.). "Claims-made policies cover only claims actually filed in the policy year . . . so long as they arose at an earlier time when a policy from the same company was in force." SLOAN, *supra* note 21, at 6.
- 39. MICHAEL A. HATCH, COMM'R, MINN. DEP'T OF COMMERCE, MEDICAL MALPRACTICE CLAIM STUDY: 1982-1987, at 14 (1988).
  - 40. *Id*.
  - 41. *Id*.
- 42. Eleanor D. Kinney, U.S. Congress, Office of Technology Assessment. Study on Defensive Medicine and the Use of Medical Technology. Background Paper on: The Impact of Current and Proposed Tort Reform on the Medical Malpractice System and Physician Behavior, 3 (Sept. 1993) (unpublished manuscript, on file with The Center for Law and Health, Indiana University School of Law—Indianapolis) [hereinafter "Tort Reform"].
  - 43. 15 U.S.C. §§ 1011-1015 (1988).
  - 44. Tort Reform, supra note 42, at 3.
- 45. Symposium, supra note 22, at 1212. See generally Randall R. Bovbjerg, Legislation on Medical Malpractice Further Developments and a Preliminary Report Card, 22 U.C. DAVIS L. REV. 499 (1989) (discussing the background of the perceived crisis and the various approaches taken to reach solutions).

The goal of these medical malpractice statutes was to reduce the potential liability of health care providers, thereby lowering medical malpractice insurance costs, assuring availability of such insurance, reducing the necessary period of time for keeping medical records in anticipation of possible litigation, and assuring medical care availability in perceived high risk care areas and voluntary health care services.<sup>46</sup>

To resolve the problems credited to the perceived crisis, Indiana passed the Medical Malpractice Act of 1975.<sup>47</sup> In 1975, a total of forty-one states formally authorized commissions to study the perceived medical malpractice problem.<sup>48</sup> Also in 1975, nineteen states made changes to their statutes of limitation. Most states merely shortened the time period, but a few states, like Indiana, amended the applicability of their statute to include minors.<sup>49</sup> The purpose of these statutes of limitation is to cut off the long-tail liability of insurance companies, thus reducing medical malpractice insurance costs.<sup>50</sup>

The problems that result from extended periods of potential liability, such as faded memories and unavailability of documents and witnesses, are increased when children's cases are brought under traditional tolling statutes, which allow minors to bring suit after reaching the age of majority.<sup>51</sup> Statutory medical malpractice limitations of actions were enacted to limit these problems. Yet, in the majority of states that shortened the limitation period for minors a minimal tolling period for young minors was allowed.<sup>52</sup>

Combining the debate concerning the validity of the perceived crisis with the relative lack of legislative history concerning the effect on minors' rights resulting from legislative changes to the medical malpractice statute of limitation adds to the question of whether a state's legislature, possessing the qualified power to pass a statute of limitation, violated any rights belonging to minors.

## C. Levels of Judicial Scrutiny

The resolution of a claim that a statute is unconstitutional as violative of equal protection depends in part on the level of judicial scrutiny used by a court. Faced with constitutional equal protection challenges, federal courts use a low level "rational basis"

- 46. See sources cited supra note 21; sources cited infra notes 48, 52.
- 47. See sources cited supra note 2.
- 48. Steven A. Grossman, An Analysis of 1975 Legislation Relating to Medical Malpractice (unpublished manuscript, on file with Health Policy Center, Georgetown University).
- 49. *Id.* (States making a change: Alabama, California, Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Nevada, New York, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas).
  - 50. See Eiesland, supra note 23, at 685; Leibowitz, supra note 32, at 575.
- 51. Jane M. Draper, Annotation, *Medical Malpractice Statutes of Limitation Minority Provisions*, 62 A.L.R. 4th 758, 763 (1988) [hereinafter "Draper"].
- 52. Rob B. Alston, Utah's Statute of Limitation Barring Minors from Bringing Medical Malpractice Actions: Riding Roughshod over the Rights of Minors?, 1992 UTAH L. REV. 929, 970-71 nn.188-91 (1990) (providing a list of states with changes to their medical malpractice statute of limitation for minors). The reasons for the tolling are varied, yet include the inability of young minors to effectively communicate their problems and the inability to detect some defects at an early age. Id. at 939 nn.46-47.

test, which requires that the state's statute rationally promote a legitimate governmental objective.<sup>53</sup>

The intermediate level of judicial scrutiny is usually applied only to gender-based classifications and categories based on legitimacy.<sup>54</sup> This intermediate level of judicial scrutiny requires a classification to be reasonable and to be based on "some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstances [are] treated alike."<sup>55</sup> The proponent of the statute, which classifies individuals based on their gender, must show that the classification serves "important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives."<sup>56</sup>

When analyzing a charge that a state's law is unconstitutional, the highest level of judicial scrutiny is the strict scrutiny test. This test requires a legislative scheme to advance a compelling state interest by the least restrictive means possible.<sup>57</sup> The courts use strict scrutiny for fundamental rights and for suspect classifications such as race, religion, nationality and alienage.<sup>58</sup> Fundamental rights are those that are "explicitly or implicitly guaranteed by the Constitution."<sup>59</sup> "Only rarely are statutes sustained in the face of strict scrutiny."<sup>60</sup>

- 53. Id. at 943.
- 54. David R. Smith, Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws, 38 OKLA. L. REV. 195, 204 & n.43 (1985). See, e.g., Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988), in which the Supreme Court noted that the intermediate level of judicial scrutiny "has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy." Id. at 451 (citing Plyler v. Doe, 457 U.S. 202 (1981)).
- 55. See Smith, supra note 54, at 204 & n.44 (citing Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920))).
- 56. Heckler v. Mathews, 465 U.S. 728, 744 (1984) (quoting Mississippi University for Women v. Hogan, 458 U.S. 718, 724-25 (1982)).
  - 57. See Smith, supra note 54, at 202.
  - 58. Smith, supra note 54, at 202.
- 59. Smith, *supra* note 54, at 202 n.30. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986), where the Supreme Court stated that "the nature of the rights qualifying for heightened judicial protection . . . includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed" and "those liberties that are 'deeply rooted in this Nation's history and tradition." *Id.* at 191 (citing Palko v. Connecticut, 302 U.S. 319, 325-26 (1937), and Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).
- 60. Bernal v. Fainter, 467 U.S. 216, 219 & n.6 (1984). See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986). In *Goldman*, Justice O'Connor reviewed the scrutiny tests previously employed by the Supreme Court in the context of a free exercise of religion claim and stated:

First, when the government attempts to deny a free exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated 'compelling,' 'of the highest order,' or 'overriding.' Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the 'least restrictive' or 'essential,' or that the interest will not 'otherwise be served.'

Id. at 530 (O'Connor, J., dissenting).

The differentiation between due process and equal protection is that "[d]ue process emphasizes fairness between the state and the individual" versus "[e]qual protection . . . [which] emphasizes disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable." The Constitution's guarantee of due process of law requires that the government shall not deprive individuals of "life, liberty, or property, without due process of law." A tortious cause of action, the right to sue, is a type of property that cannot be taken without due process of law.<sup>63</sup>

Federal courts use essentially the same tests to evaluate due process challenges as they use for equal protection challenges. Under the rational basis test, economic and social regulations are sustained if not completely arbitrary or unfounded.<sup>64</sup> However, to withstand strict scrutiny, a state must prove that legislation involving fundamental rights or restrictions on political processes is justified by a compelling interest.<sup>65</sup>

Most state courts use these same three tests. The Supreme Court of South Dakota, in Lyons v. Lederle Laboratories, 66 stated:

In traditional equal protection analysis, on both the federal and state levels, there exists three tests to be applied depending upon the nature of the interest involved. Strict scrutiny applies only to fundamental rights or suspect classes. The intermediate or substantial relation test applies to legitimacy, and gender. Lastly, the rational basis test applies to all other classes.<sup>67</sup>

Thus, an important factor in determining whether a medical malpractice statute of limitation for minors is constitutional is the level of scrutiny to be used. Because the level of scrutiny employed varies in the state courts, the results of lawsuits questioning the constitutionality of such statutes vary as well.<sup>68</sup>

<sup>61.</sup> Smith, supra note 54, at 210 (quoting Ross v. Moffitt, 417 U.S. 600, 609 (1974)).

<sup>62.</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1 (Both the Fifth and the Fourteenth Amendments use identical language, as quoted.). See Whitney v. California, 274 U.S. 357 (1927). In Whitney, Justice Brandeis stated that "it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." Id. at 373.

<sup>63.</sup> Smith, *supra* note 54, at 210 & n.87.

<sup>64.</sup> See, e.g., Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

<sup>65.</sup> See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Foucha v. Louisiana, 112 S. Ct. 1780 (1992). "Certain substantive rights we have recognized as 'fundamental'; legislation trenching upon these is subjected to 'strict scrutiny,' and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring. Such searching judicial review of state legislation, however, is the exception, not the rule, in our democratic and federal system . . . ." Id. at 1804 (Kennedy, J., dissenting).

<sup>66. 440</sup> N.W.2d 769 (S.D. 1989).

<sup>67.</sup> Id. at 771 (citations omitted).

<sup>68.</sup> Alston, *supra* note 52, at 943-44 nn.65-66.

## II. INDIANA

#### A. Indiana's Medical Malpractice Statutes

Indiana's medical malpractice statute of limitation requires children under the age of six to file their suit by their eighth birthday; children six years of age or older have two years in which to file.<sup>69</sup> Indiana is rather unique because state law allows minors to bring a suit "(1) in their own name; (2) in their own name by a guardian ad litem or a next friend; [or] (3) in the name of his representative, if the representative is a court appointed general guardian, committee, conservator, guardian of the estate or other like fiduciary."<sup>70</sup> Thus, a child almost eight years old, with a viable medical malpractice cause of action which arose before he or she was six years old, can file suit. If the suit is not filed, it is lost.

The medical malpractice statute of limitation for minors is a bad social policy for several reasons. First, it is a long standing rule that a minor is not bound by contracts into which the minor enters. Such contracts are voidable.<sup>71</sup> Thus, the possibility exists that a contract between a minor and an attorney could be voided by the minor after a judicial recovery. Yet, the minor may be bound if the contract is for necessaries, including items for the basic support, use or comfort of the minor.<sup>72</sup> Arguably, necessaries could include attorney fees for a medical malpractice claim. However, attorneys would be assuming some additional risk by contracting with the minor. Therefore, a minor could have difficulty in acquiring competent representation.

Second, allowing and requiring a minor to bring suit before the child's eighth birthday is impractical and unfair. At age eight, a child is in the second grade of elementary school and realistically cannot be expected to know that such a thing as a lawsuit even exists nor how to pursue it. Due to these inherent limitations, a minor could lose valuable and necessary compensation for injuries suffered. Society should not impose this type of responsibility on children.

Third, the fact that a representative or guardian ad litem<sup>73</sup> can represent a minor assumes that one was previously appointed or that the minor's cause of action actually reached the litigation stage. This assumption provides relatively little protection for the minor. Many viable claims will never be pursued because no one is appointed to protect the minor's interests.

<sup>69.</sup> IND. CODE ANN. §§ 27-12-7-1, 27-12-7-2; IND. CODE § 34-4-19-1. Governor Bowen has stated: "For children, . . . the suit can be brought up to eight years [after the occurrence of the malpractice], so that any brain damage as a result of a birth injury can be assessed." Round Table, *supra* note 20, at 9-10.

<sup>70.</sup> IND. R. TRIAL P. 17. See infra subpart III.B. (discussing that other states do not allow minors to file suit in their own name).

<sup>71.</sup> Rice v. Boyer, 9 N.E. 420 (Ind. 1886). See also WEST'S IND. LAW ENCYCLOPEDIA Minors § 51 (1959) [hereinafter ENCYCLOPEDIA]; IND. CODE § 34-1-2-5.5 (1988) (stating that contracts cannot be voided by a person after reaching the age of eighteen). This age limitation is affected by § 34-1-67-5 (requiring "a liberal construction for provisions in this article").

<sup>72.</sup> Grossman v. Lauber, 29 Ind. 618 (Ind. 1868). See also ENCYCLOPEDIA, supra note 71, at § 53.

<sup>73.</sup> BLACK'S, *supra* note 8, at 489 (stating that a guardian ad litem is appointed by a court for a pending litigation to represent an infant, ward or unborn person).

Fourth, a minor's claim can be filed by "a next friend," who could be a parent. But a parent has no legal obligation to file a claim for a minor child. If a parent fails to file the minor's claim and the statute of limitation extinguishes it, then the minor has no legal recourse against the parent. Because of the importance of the parent-child relationship, the Indiana Supreme Court recognized the doctrine of parental tort immunity in *Barnes v. Barnes*. The *Barnes* court found a narrow exception to this parental immunity for intentional felonious conduct by parents toward their children when there is no issue of parental privilege. In general, however, should a parent decide to not file a claim for the child, parental immunity deprives the minor of any legal recourse.

Parents may fail to file a claim for their child for many reasons. First, as stated by the Texas Supreme Court in Sax v. Votteler: "It is neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit action within the time provided by [the statute]." Second, the parents may be filing their own claim against the minor's health care provider who has limited liability insurance. If the parents decide to sue for the maximum amount of the available insurance coverage, nothing will be left for the minor to pursue. Third, the parents may accept an out of court settlement as compensation for the child's injuries, but the child has no assurance that this settlement money will be kept for the child's sole use. In these latter two cases, the parents may be making their decision with the intention of providing for their child. However, the parents' action still deprives their minor child of the right to pursue his or her own legal interest. To allow minors to lose the right to pursue their claims for needed damages due to their parents' action or inaction is unfair and poor public policy.

As discussed, a minor may have a viable claim meriting compensation yet for many reasons would lose the opportunity to pursue his or her legal interest. Although the number of lost opportunities is unknown, "empirical research in New York and California found that one per cent of hospital medical records showed negligent medical injury . . . [and] there are eight to ten times more negligent injuries than claims or lawsuits." These injuries result in significant economic loss to the victim patients. Thus, many negligent injuries are not pursued through the legal system. Although the number of these potential claims belonging to minors is unknown, for any minor to lose his or her right of action due to his or her inherent limitations is unfair.

#### B. Indiana's Constitutional Challenges

Legislatures are allowed to enact statutes on limitation of actions, <sup>80</sup> but this power is not unqualified. "The legislature has the sole duty and responsibility to determine what

<sup>74.</sup> IND. R. TRIAL P. 17; BLACK'S, *supra* note 8, at 724 (stating that a "next friend" is one who acts for an infant's benefit, and is an officer of the court, but is not a regularly appointed guardian).

<sup>75. 603</sup> N.E.2d 1337 (Ind. 1992).

<sup>76.</sup> Id. at 1342.

<sup>77.</sup> Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983).

<sup>78.</sup> Tort Reform, supra note 42, at 34.

<sup>79.</sup> Tort Reform, supra note 42, at 34.

<sup>80.</sup> Bunker v. National Gypsum Co., 441 N.E.2d 8, 12 (Ind. 1982), appeal dismissed, 460 U.S. 1076 (1983).

constitutes a reasonable time for bringing of an action unless the period allowed is so manifestly insufficient that it represents a denial of justice."<sup>81</sup> The question raised by the medical malpractice statute of limitation period is whether it constitutes a denial of justice to minors.

1. Johnson v. St. Vincent Hospital.—Although gaps in the medical malpractice statute of limitation may adversely affect minors, the Indiana Supreme Court upheld Indiana's medical malpractice statutes in Johnson v. St. Vincent Hospital.<sup>82</sup> The court considered four separate appeals that were consolidated for this hearing in order to determine whether the special controls and limitations of the statutes were consistent with various guarantees of the Indiana and Federal Constitutions. More specifically, the statute of limitation provision as it applied to minors was challenged as violative of Indiana's Open Court and Due Course/Process of Law Provision<sup>83</sup> and Privileges and Immunities Provision.<sup>84</sup> The court used a lower level rational basis test and concluded that the statutes were constitutional.<sup>85</sup>

In applying the lower level of judicial scrutiny the court accorded the legislature considerable deference. Although the Indiana legislature did not enunciate a clear purpose for the Medical Malpractice Act, the *Johnson* court did find a purpose after analyzing a "great deal of proof" that presumably brought about the conditions prompting the Act. The court found that the Act's limitations were designed to allow insurers to better anticipate their expenses and to guarantee insurance to all health care providers. The court discussed the purpose of the statute of limitation and the problems associated with delays in filing suit. Unfortunately, the court did not consider the fact that minors also face the problem of collecting relevant evidence after a long delay in filing suit, which makes proof of their claims more difficult. Other courts have similarly failed to do so. When considering the feasibility of an extension to the statute of limitation, the minors' problems partially offset the insureds' problems of collecting relevant evidence.

- 81. Id. (citing Wilson v. Iseminger, 185 U.S. 55, 63 (1902)).
- 82. 404 N.E.2d 585 (Ind. 1980).
- 83. See supra note 6.
- 84. See supra note 7.
- 85. Cf. Collins v. Day, 644 N.E.2d 72 (Ind. 1994). In Collins, the Indiana Supreme Court drew a distinction between the requirements of Indiana's Privileges and Immunities Clause and the Federal Constitution's Equal Protection Clause. Also, the court dispensed with the various levels of judicial scrutiny, and settled on a single degree of scrutiny for analysis of claims arising under the Privileges and Immunities Clause. See infra subpart II.B.6. Although a privileges and immunities challenge in a case such as Johnson v. St. Vincent Hospital would currently be analyzed differently by the Indiana Supreme Court, arguably the resulting decision would still be the same.
  - 86. Johnson, 404 N.E.2d at 604. See also Draper, supra note 51, at 777.
  - 87. Johnson, 404 N.E.2d at 589.
- 88. *Id.* at 590. *See, e.g.*, *Rohrabaugh*, 413 N.E.2d at 894 (finding that the Act was intended to prevent the loss of insurance availability to health care providers). *See generally*, Catherine Schick Hurlbut, Note, *Constitutionality of the Indiana Medical Malpractice Act: Re-evaluated*, 19 VAL. U. L. REV. 493 (1985).
  - 89. Johnson, 404 N.E.2d at 604.

In reaching its decision, the *Johnson* court assumed that the legislature considered all possible ramifications of the Act, yet no record exists of the legislature discussing the effect of the statute of limitation on minors. In striving to find a legislative purpose, the court stated that "the legislature may well have given consideration to the fact that most children by the time they reach the age of six years are in a position to verbally communicate their physical complaints to parents or other adults." This point is moot, given the limitations on children's ability to protect their legal interests, discussed *supra*. The fact that children will be adversely affected by the statute of limitation did not influence the court, which stated that a "statute is not unconstitutional simply because the court might consider it born of unwise, undesirable or ineffectual policies."

2. Rohrabaugh v. Wagoner.—Later in 1980, the Indiana Supreme Court rejected a claim that the medical malpractice statute of limitation denied "minors equal protection of law guaranteed by the Fourteenth Amendment and Art. I, § 23, of the Indiana Constitution and their remedy by due course of law guaranteed by Art. I, § 12, of the Indiana Constitution."<sup>93</sup>

Using a low level scrutiny test, the *Rohrabaugh* court stated that the statutory classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." This lower standard "is whether the legislative classification is based upon substantial distinctions with reference to the subject matter, or is manifestly unjust or unreasonable."

Reviewing the background of the Medical Malpractice Act, the court noted that it was enacted as "a legislative response to the reduction of health care services available to the public in the state." One provision of the Act was to withdraw the disability protection from minors and subject them to the same statute of limitation as persons over the age of twenty-one. Although the legislature was silent on the purpose, the court stated that the provision could have been enacted to reduce the potential unfairness of extended liability exposure to health care providers and to reduce the problems of the perceived insurance crisis. Additionally, reference was made to the *Johnson* court's reasoning that six year old children are able to communicate their complaints.

Using the lower level of judicial scrutiny, the Rohrabaugh court found that the statute of limitation did not affect a fundamental right, but rather it cut off the availability of a

<sup>90.</sup> *Id*.

<sup>91.</sup> See supra subpart II.A.

<sup>92.</sup> Johnson, 404 N.E.2d at 591. See, e.g., Douglas v. Stallings, 870 F.2d 1242 (7th Cir. 1989) (The federal court upheld the constitutionality of the Indiana Medical Malpractice Act's Statute of Limitation as it applied to minors.).

<sup>93.</sup> Rohrabaugh v. Wagoner, 413 N.E.2d 891, 892 (Ind. 1980). The court's analysis of Article I, Section 23 of the Indiana Constitution is altered by the single judicial scrutiny test established in Collins v. Day, 644 N.E.2d 72 (Ind. 1994); see infra subpart II.B.6.

<sup>94.</sup> Rohrabaugh, 413 N.E.2d at 894 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412 (1920)).

<sup>95.</sup> Id.

<sup>96.</sup> Id.

<sup>97.</sup> Id. at 895.

<sup>98.</sup> Id.

remedy or limited the substantive right giving rise to the claim.<sup>99</sup> The court also found that the statute did not operate to the peculiar disadvantage of a suspect class. The court defined a suspect class as one, "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Appellant Rohrabaugh argued that the group of children from six to eighteen years of age constituted a suspect class because this group was newly subjected to this two year statute of limitation. Rejecting this assertion, the court stated that "[u]nlike illegitimacy, childhood is a stage out of which millions of persons inevitably pass in an unending flow, day after day. Children become adults and are empowered." 101

The Rohrabaugh court reviewed the mixed historical treatment of children, considering early child labor laws, mandatory school attendance laws and child abuse protection laws. All of these laws are designed to protect children, who are inherently vulnerable. The court noted that children are "limited in their right to operate motor vehicles, to vote, and to marry." These limitations are designed to restrict children's activities due to their inherent level of maturity and physical skills, and such laws serve to protect children and the rest of the public. "The laws respecting children have in the main in recent years been based upon the premise that children are undergoing physical and psychological growth and during this process they are limited in their capacity for making those evaluations thought necessary [for] full participation in the political, economic, and social life of the community." The court acknowledged that historically children have been discriminated against due to this growth and development factor. Because children typically are unable to effectively assert their own claims, the court's reasoning appeared to be a sound basis for protecting children from the two year statute of limitation. But the court inexplicably contradicted its own reasoning. The court stated:

[T]he disparate treatment accorded children has been based in recent times upon knowledge of the process of growth, a process to which all human beings are subject. Consequently, we conclude that the class newly subject to this two year statute of limitation, children between the ages of six and twenty-one, is not suspect.<sup>104</sup>

The court found that children as a class are not per se discriminated against and thus are not a per se suspect class. Although the court reviewed laws designed to protect children due to their natural limitations, and such limitations adversely affect children under the medical malpractice statute of limitation, the court declined to afford them any protection.

The Rohrabaugh court then determined that there was a reasonable basis for the Act and for the conclusion "that [such minors] and adults are similarly circumstanced with regard to their ability to bring malpractice actions." The court held that the statute was

<sup>99.</sup> Rohrabaugh, 413 N.E.2d at 893.

<sup>100.</sup> Id. (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 46 (1973)).

<sup>101.</sup> Id. at 894.

<sup>102.</sup> Id.

<sup>103.</sup> Id.

<sup>104.</sup> Rohrabaugh, 413 N.E.2d at 894.

<sup>105.</sup> Id. at 895.

consistent with the State and Federal Constitutions' guarantees of equal protection of the laws. 106 Although the court recognized that this is a stern statute with harsh results, it stated that a court is without "authority to annul a statute because of that fact." 107

The question is whether the medical malpractice statute of limitation is reasonable or is manifestly unjust or unreasonable. First, by the court's own admission, the measure is stern and some could consider it unjust. The limitations on children's ability to protect their legal rights, discussed *supra*, <sup>108</sup> illustrates the unreasonableness of concluding that both minors of this class and adults are equally able to pursue medical malpractice actions. Second, the court stated that prolonged exposure to potential liability is unfair to health care providers but failed to discuss the potential unfairness of the statute of limitation's effect on children less than six years old who must bring suit before their eighth birthday. Third, the *Rohrabaugh* ruling seems unfair as the court ruled contrary to its line of reasoning regarding the historical treatment of children. The court discussed the forms of protection that were provided for children due to their inherent vulnerabilities and limitations, yet declined to protect them from the harshness of the medical malpractice statute of limitation.

The Rohrabaugh court strove to find a justification for its decision. Rohrabaugh's reasoning would have been more honest if the court had simply stated that it was going to support the statute of limitation even though it was in conflict with historical social policies for minors.

3. Sherfey v. City of Brazil.—Both Johnson and Rohrabaugh relied on Sherfey v. City of Brazil<sup>109</sup> when they held that the statutes did not violate Indiana's due course of law guarantee because the legislature is not constitutionally required to suspend the statute of limitation obligations for infancy or incompetency.<sup>110</sup>

Sherfey involved an action to recover for injuries sustained by a nine year old child in the City of Brazil's park. An Indiana statute required that notice be given to the city within sixty days of such an accident.<sup>111</sup> When Sherfey failed to meet this requirement, he challenged the statute as violating the Indiana Constitution's Due Course of Law Provision. The court first noted that the claim stated a good cause of action based on a common law duty.<sup>112</sup> As the United States Supreme Court stated in Munn v. Illinois, <sup>113</sup> common law rights cannot be taken away without due process, but the legislature can change them unless constitutional limitations prevent it from doing so.<sup>114</sup> Accordingly, the Sherfey court found that the remedy for breach of a common law right could be restricted through either statutes of limitation or notice requirements. The court also stated "that neither infancy nor incapacity can suspend the obligation to comply with the

<sup>106.</sup> *Id*.

<sup>107.</sup> Id.

<sup>108.</sup> See supra subpart II.A.

<sup>109. 13</sup> N.E.2d 568 (Ind. 1938).

<sup>110.</sup> Johnson v. St. Vincent Hosp., 404 N.E.2d 585, 594 (Ind. 1980) (see supra subpart II.B.1); Rohrabaugh, 413 N.E.2d at 893 (See supra subpart II.B.2).

<sup>111.</sup> Sherfey, 13 N.E.2d at 569.

<sup>112.</sup> Id. at 572.

<sup>113. 94</sup> U.S. 113 (1877).

<sup>114.</sup> Id. at 134.

statutory notice." Thus, the court rejected Sherfey's assertion that the notice requirement should not apply to the child because the requirement violates due process of law which "guarantees him recourse to the courts for enforcement of his common-law rights." 116

Sherfey, a 1938 case, relied upon Touhey v. City of Decatur, <sup>117</sup> a 1911 case, to dismiss the charge that the notice requirement should not apply to an infant claimant who was physically unable to care for himself and unable to protect his legal interests. <sup>118</sup> According to the Sherfey court, Touhey held that "the fact that a claimant is an infant or a person under mental or physical disabilities will not relieve him of [the] obligation" of giving notice to a municipality. <sup>119</sup> The Sherfey court stated that "notice requirements may be enacted when the action is statutory is not open to question. When one seeks the benefit of a statute, he must" comply with its terms. <sup>120</sup> Because Touhey concerned a statutory action and the statutory notice requirement, Sherfey was Indiana's first case to consider the question of the application of notice statutes to common law actions.

Appellant Sherfey referred the court to the laws of Missouri and Illinois, which have constitutional guarantees similar to Indiana's open court and due course of law guarantees. In both the Missouri case of Randolph v. City of Springfield<sup>121</sup> and the Illinois case of McDonald v. City of Spring Valley, <sup>122</sup> the courts held that a disability tolls the notice statute. <sup>123</sup> But, relying upon Touhey, the Sherfey court rejected these positions. <sup>124</sup> Thus, despite contrary persuasive authority and based upon a decision rendered twenty-seven years earlier, Indiana extended to minors the application of the notice requirement for statutory and common-law causes of action.

Since *Sherfey* concerned notice requirements, the court's mention of the statute of limitation was dicta. Yet the *Johnson* court relied on *Sherfey* to make its decision. In addition, the decision was made after only a brief discussion of whether the medical malpractice statute of limitation complies with Indiana's due course of law and open court guarantees. Similarly, the *Rohrabaugh* court dismissed the due course of law and open

<sup>115.</sup> Sherfey, 13 N.E.2d at 574 (citing Touhey v. City of Decatur, 93 N.E. 540 (Ind. 1911)).

<sup>116.</sup> *Id*.

<sup>117. 93</sup> N.E. 540 (Ind. 1911).

<sup>118.</sup> Sherfey, 13 N.E.2d at 574.

<sup>119.</sup> Id. at 572 (citing Touhey v. City of Decatur, 93 N.E. 540, 541 (Ind. 1911)).

<sup>120.</sup> *Id.* at 572-73. *See, e.g.*, Cook v. Violent Crime Compensation Fund, 557 N.E.2d 1093 (Ind. Ct. App. 1990). Cook, a minor, was stabbed and subsequently applied for benefits from the Violent Crime Compensation Fund. The application was filed more than two years after the crime was committed, but less than two years after Cook reached the age of majority. The court stated that the right to benefits was purely statutory; thus, the two year requirement to file the claim after the incident is a statutory condition precedent to the creation of an enforceable right of action. Also, the court stated that because the statute was silent concerning minority or legal disabilities, such disabilities did not toll the time requirement. *Id.* 

<sup>121. 257</sup> S.W. 449 (Mo. 1923).

<sup>122. 120</sup> N.E. 476 (III. 1918).

<sup>123.</sup> Randolph, 257 S.W. at 452; McDonald, 120 N.E. at 477.

<sup>124.</sup> Sherfey, 13 N.E.2d at 574.

<sup>125.</sup> Johnson v. St. Vincent Hosp., 404 N.E.2d 585, 593-94 (Ind. 1980). See supra subpart II.B.1.

court challenge with very little discussion.<sup>126</sup> Thus in 1980, the Indiana Supreme Court rejected open court and due course of law challenges to the medical malpractice statute of limitation as it applied to minors based upon dicta contained in *Sherfey*, which relied upon criticized reasoning established in *Touhey*, which in turn dealt with only a notice requirement and was decided sixty-nine years before *Johnson* and *Rohrabaugh*. The 1980 Indiana Supreme Court made these decisions without considering whether *Touhey*, the 1911 case, was good policy and without asking if the 1911 and 1938 reasoning should apply to the 1980 statute of limitation cases. Constitutional law develops over time, but only by asking appropriate questions and considering appropriate policy. Now is the time to ask whether the criticized policy for notice requirements of 1911 should apply to the medical malpractice statute of limitation requirements of today.

4. City of Ft. Wayne v. Cameron.—The Johnson and Rohrabaugh courts overlooked City of Ft. Wayne v. Cameron. 127 The Cameron court reviewed a tort action against the city that arose out of the shooting of a minor by a city policeman. The minor, Cameron, who was paralyzed as a result of the shooting, notified the city less than one month after attaining majority but later than the statutory sixty-day notice requirement. The court stated that because Cameron was mentally and physically incapacitated to give notice, a strict application of the statute would deprive Cameron of his constitutional right to a remedy by due course of law. 128 Also, permitting strict application of the statute "would create a situation whereby a city could escape liability if the injuries suffered by an individual were so great that he was unable to comply with the terms of the statute within the sixty-day period."<sup>129</sup> The court held that if Cameron had such an incapacity then he had a reasonable time after the removal of the disabilities in which to file the notice. 130 The shooting occurred while Cameron was a minor and he gave notice only after "he attained his majority."131 Curiously, the court did not mention Cameron's disability as being one of age, although it may have been a factor in the decision. By 1977, the year Cameron was decided, the legislature had codified the essence of this ruling by allowing incompetents to file the required notice within 180 days after incompetency was removed.132

The *Touhey* and *Sherfey* courts' strict application of the notice requirements to minors was not observed by *Cameron*. The *Cameron* court stated that such strict application violated the due course of law guarantee.<sup>133</sup> Yet *Johnson* and *Rohrabaugh* dismissed the charge that the medical malpractice statute of limitation violated Indiana's due course of law guarantee by relying on *Sherfey* and, ultimately, *Touhey*. *Cameron* presents precedent for reevaluation of such strict application of statutes of limitation to minors.

<sup>126.</sup> Rohrabaugh v. Wagoner, 413 N.E.2d 891, 893 (Ind. 1980). See supra subpart II.B.2.

<sup>127. 370</sup> N.E.2d 338 (Ind. 1977).

<sup>128.</sup> Id. at 341.

<sup>129.</sup> Id.

<sup>130.</sup> *Id*.

<sup>131.</sup> Id. at 339.

<sup>132.</sup> Cameron, 370 N.E.2d at 340 n.\*.

<sup>133.</sup> Id. at 341.

5. South Bend Community Schools Corp. v. Widawski.—In October, 1993, the Indiana Supreme Court decided South Bend Community Schools Corp. v. Widawski. <sup>134</sup> The minor, Widawski, was injured during gym class and brought an action against the school and the teacher. The court held in a four to one decision that under the Indiana Tort Claims Act, <sup>135</sup> minority status qualifies the person as incapacitated and postpones the deadline for giving the required notice of the tort claim until 180 days after minority ends. <sup>136</sup>

The Widawski court stated that "children are inherently limited in their capacity for self-sufficiency. Persons under eighteen years of age are additionally under a legal disability." Also, minors have a limited "ability to provide self-care or to fully manage their own property." Thus, the court recognized the need for special protection for minors. The court noted that Indiana common law has long recognized minors to be under a legal disability and that changes to the common law must be by expressed terms or by unmistakable implication. Therefore, such a statute as the Tort Claims Act, which is in derogation of the common law, must be strictly construed. Using this rule, and dealing with a statutory construction issue, the court found that the statutory phrase "other incapacity" included minors.

Widawski presents several especially interesting points. First, the court strove to find an exception for minors despite the new statute's failure to expressly include minors in the term "incompetent." As Chief Justice Shepard pointed out in his dissent, such exclusion of reference by the legislature was intentional to exclude minors from any extended time period. Second, the majority's attitude toward minors is in line with the Cameron court's attitude toward persons with disabilities. Both attitudes are contrary to Touhey and Sherfey and their protegés Johnson and Rohrabaugh. Third, the majority stated that its "construction is also in harmony with Article I, Section 12, of the Indiana Constitution which provides that 'every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." With the construction issue already decided, the court's statement is curious. It may solely have been intended to lend validity to the court's holding. Or, taking the three points together, the majority may be sending a message to the legislature that the court is concerned for

<sup>134. 622</sup> N.E.2d 160 (Ind. 1993).

<sup>135.</sup> IND. CODE ANN. §§ 34-4-16.5-1 to -16.5-20 (Burns 1986 & Supp. 1993). IND. CODE ANN. § 34-4-16.5-7 (Burns 1986) requires notice of a claim against a political subdivision to be filed within 180 days after the loss occurs. See Widawski, 622 N.E.2d at 161.

<sup>136.</sup> Widawski, 622 N.E.2d at 162.

<sup>137.</sup> *Id*.

<sup>138.</sup> Id.

<sup>139.</sup> *Id*.

<sup>140.</sup> IND. CODE ANN. § 34-4-16.5-8 (West Supp. 1993). This statute allows notice to be given 180 days after incapacity is removed. IND. CODE ANN. § 34-4-16.5-2 (West Supp. 1993) defines "incapacitated" as set forth in IND. CODE ANN. § 29-3-1-7.5 (Burns 1989), which defines the term and includes the category "other incapacity." See Widawski, 622 N.E.2d at 161.

<sup>141.</sup> Widawski, 622 N.E.2d at 162.

<sup>142.</sup> Id.

<sup>143.</sup> Id.

minors' constitutional rights under the due course of law guarantee as it relates to notice statutes. Consequently, because the *Touhey* notice case ultimately served as the basis for the *Johnson* and *Rohrabaugh* rulings concerning due course of law guarantee challenges to the medical malpractice statute of limitation as it applied to minors, the Indiana Supreme Court also may be putting the legislature on notice that the court will be less resistant to such constitutional challenges to the statute of limitation in the future.

6. Collins v. Day.—In November, 1994, the Indiana Supreme Court decided Collins v. Day. 144 In Collins, the court addressed the question of whether the requirements of the Indiana Constitution's Privileges and Immunities Clause 145 were distinct from the requirements of the Federal Constitution's Equal Protection Clause. 146 The court noted the textual differences between the two clauses, specifically that "[t]he Fourteenth Amendment prohibits laws which 'abridge' privileges or immunities, whereas Section 23 prohibits laws which 'grant' unequal privileges or immunities. 147 The court noted that, in the past, it has "assumed various postures with respect to "the applicability of federal Fourteenth Amendment standards to Section 23 questions. 148 Although previous cases had applied federal standards to Section 23 claims, the court "conclude[d] that there is no settled body of Indiana law that compels application of a federal equal protection analytical methodology to claims alleging special privileges or immunities under Indiana Section 23 and that Section 23 should be given independent interpretation and application. 149

After reviewing the historical development and application of the Privileges and Immunities Clause, the court determined that such review "distill[ed] into two general factors."<sup>150</sup> The court stated that "[f]irst, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes."<sup>151</sup> The second factor is the need for all persons similarly situated to have "uniformity and equal availability of the preferential treatment."<sup>152</sup>

- 144. 644 N.E.2d 72 (Ind. 1994).
- 145. IND. CONST. art. I, § 23; see supra note 6.
- 146. U.S. CONST. amend. XIV, § 1.
- 147. Collins, 644 N.E.2d at 74.
- 148. *Id.* at 74-75. The court noted that it had "considered the two provisions essentially synonymous" in Johnson v. St. Vincent Hospital, 404 N.E.2d 585, 600 (Ind. 1980). *Collins*, 644 N.E.2d at 75. *See supra* subpart II.B.1.; *see infra* notes 186-88 and accompanying text.
  - 149. Collins, 644 N.E.2d at 75.
  - 150. Id. at 78.
  - 151. Id. at 80. The court also stated:

[W]here the legislature singles out one person or class of persons to receive a privilege or immunity not equally provided to others, such classification must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics.

Id. at 78-79.

152. *Id.* at 79. The court restated the second requirement for compliance with the Privileges and Immunities Clause:

[A]ny privileged classification must be open to any and all persons who share the inherent characteristics which distinguish and justify the classification, with the special treatment accorded

The court in *Collins* noted that this two-part standard is to be applied with "considerable deference to the manner in which the legislature has balanced the competing interests involved."<sup>153</sup> Also, the issue of classification is primarily determined by the legislature.<sup>154</sup> And, to overcome the judicial presumption of constitutionality, the burden is on "the challenger 'to negative every conceivable basis which might have supported the classification.'"<sup>155</sup> Significantly, the Indiana Supreme Court stated that claims arising under the Privileges and Immunities Clause will be analyzed with the same degree of scrutiny for different protected classes "to prohibit any and all improper grants of unequal privileges or immunities."<sup>156</sup>

Collins involved a state Equal Protection Clause challenge to the Indiana Worker's Compensation Statute, which excludes agricultural workers from coverage. Eugene Collins suffered a broken leg during the course of his employment as an agricultural worker, and was denied coverage under Indiana's statute.<sup>157</sup> The court found that agricultural employers are inherently distinct from the general class of employers, and that the distinctions "are reasonably related to the exemption."<sup>158</sup> The court also found that the agricultural exemption was "uniformly applicable and equally available to all" agricultural employers.<sup>159</sup> Key to the court's decision was the finding that the plaintiff Eugene Collins failed to negate "every reasonable basis for the classification."<sup>160</sup>

The Indiana Supreme Court's equal protection analysis is significant because it seemingly condenses and clarifies the rules pertaining to Indiana's Privileges and Immunities Clause. Although the *Collins* equal protection analysis differs from that used in *Johnson v. St. Vincent Hospital* and *Rohrabaugh v. Wagoner*, <sup>161</sup> the similarities lead to the conclusion that *Collins* would not change the result in those cases. In particular, the *Collins* court placed great importance on its finding that the plaintiff failed to negate "every reasonable basis for the [legislative] classification." In *Johnson*, the court assumed the existence of an acceptable legislative purpose, which by implication had not been negated by the plaintiff. Likewise in *Rohrabaugh*, the court noted that the legislature was silent regarding the purpose of the medical malpractice statute of limitation for minors, yet went on to propose an acceptable possible purpose, which by

to any particular classification extended equally to all such persons.

Id.

- 153. Collins, 644 N.E.2d at 80 (citing Johnson v. St. Vincent Hosp., 404 N.E.2d 585, 604 (Ind. 1980)).
- 154. Id.
- 155. Id. (quoting Johnson, 404 N.E.2d at 597).
- 156. *Id. See supra* subpart I.C. In sharp contrast to Indiana's single degree of judicial scrutiny, the Federal Equal Protection Clause and many states' equal protection clauses are analyzed using three levels of judicial scrutiny.
  - 157. Id. at 73.
  - 158. Collins, 644 N.E.2d at 81.
  - 159. *Id*.
  - 160. *Id*
  - 161. 404 N.E.2d 585 (Ind. 1980); 413 N.E.2d 891 (Ind. 1980). See supra subparts II.B.1-2.
  - 162. Collins, 644 N.E.2d at 81.
  - 163. See supra text accompanying note 90.

implication was not negated by the plaintiff.<sup>164</sup> Also, in *Johnson*, the court found that health care providers for children face problems from extended statutes of limitation that are unique to their profession.<sup>165</sup> The Indiana Medical Malpractice Act's statute of limitation for minors was enacted to help alleviate some of these perceived problems, thus complying with the first factor in *Collins*.<sup>166</sup> The second factor is also satisfied because the special protection from this statute of limitation is equally available to all health care providers for minors. Thus, this most recent constitutional analysis would neither alter nor lend any validity to the decisions in *Johnson* or *Rohrabaugh*.

## C. Results of Indiana's Medical Malpractice Act

Although some believe that the ends justify the means, in Indiana, few, if any, positive results justify the harshness of imposing such a statute of limitation on minors. First, theoretically, state legislation favorable to insurers would encourage physicians to locate or relocate to that state. If Indiana has been touted as a paradise for physicians and anecdotal reports abound of physicians moving to Indiana to enjoy its favorable malpractice climate. If Although Indiana is known for having the strongest insurance reforms in the nation since 1975, it has not attracted more physicians than neighboring states. Actually, Indiana has fewer physicians per capita than Michigan, Ohio, or the national average, a statistic which remains unchanged since before 1975.

Second, it appears that medical malpractice reforms have not had and will not have a significant impact on physician response to medical liability. One criteria for evaluating insurance reforms is the extent to which the reforms deter negligent medical practice. Empirical evidence shows that the reforms have not caused changes in physician practice resulting in the deterrence of medical malpractice.<sup>171</sup> This lack of change is due to the fact that the "deterrent effect of malpractice on physicians operates from a psychological perception by physicians of attack on their competence rather than [on] economic concerns."<sup>172</sup> Also, physician concern with malpractice is not all bad. As Dr. Patricia Danzon, an expert on malpractice, stated: "[S]ome physician behavior that is correctly ascribed to the liability threat is not pure waste. Spending more time with patients, referring difficult cases—these are precisely the types of increased care which the malpractice system is intended to encourage."<sup>173</sup>

<sup>164.</sup> See supra text accompanying notes 97-98.

<sup>165.</sup> Johnson, 404 N.E.2d at 603-04.

<sup>166.</sup> See supra subpart I.B.

<sup>167.</sup> Tort Reform, supra note 42, at 38 (discussing more detailed background information).

<sup>168.</sup> Tort Reform, *supra* note 42, at 38 (referring to Andrew Slomski, *How Long Can Indiana Remain a Malpractice Paradise?*, MED. ECON., February 4, 1991, at 122-35.). This legislation was enacted during the term of Governor Otis R. "Doc" Bowen, M.D., who was clearly sensitive to the needs of doctors and the medical profession.

<sup>169.</sup> Tort Reform, supra note 42, at 38.

<sup>170.</sup> Tort Reform, supra note 42, at 38.

<sup>171.</sup> Tort Reform, supra note 42, at 39.

<sup>172.</sup> Tort Reform, supra note 42, at 39.

<sup>173.</sup> Tort Reform, *supra* note 42, at 37 (quoting Senate Hearings 1984:10 (statement of Patricia Danzon, Ph.D.)).

The federal government recently published the results of its study concerning the impact of the states' legal reforms on medical malpractice insurance costs.<sup>174</sup> This report stated that "limiting the statute of limitations show[s] conflicting results."<sup>175</sup> One study indicates that shortening the statute of limitation period for minors had no significant effect on claim frequency.<sup>176</sup> Two studies reached conflicting results concerning whether shorter statutes of limitation lower insurance premiums.<sup>177</sup> Also, another government survey reports that "a steady increase in the number of claims per [one hundred] physicians over the period 1980-84" occurred in Indiana.<sup>178</sup>

Even if some persons do subscribe to the notion that the end justifies the means, which is the notion that Indiana's General Assembly and Supreme Court appear to support, the ends do not appear to actually justify the means.

## III. OTHER JURISDICTIONS' CONSTITUTIONAL CHALLENGES

#### A. Federal Constitutional Challenges

The federal courts have rejected challenges that a state's medical malpractice legislation is unconstitutional under either the Equal Protection Clause or the Due Process Clause. <sup>179</sup> The Supreme Court views a statute of limitation as both affecting a remedy and not destroying fundamental rights. <sup>180</sup> Federal courts dismiss equal protection challenges by finding that malpractice legislation does not interfere with any fundamental right and that the differentiation between medical malpractice claimants and tort claimants <sup>181</sup> does

- 174. See Assessment, supra note 18.
- 175. See Assessment, supra note 18, at 2, 65. The report stated:

The one reform consistently shown to reduce malpractice cost indicators is caps on damages. Requiring collateral source payments to be deducted from the plaintiff's malpractice award has also been shown to reduce certain malpractice cost indicators. Pretrial screening panels and limiting the statute of limitations show conflicting results. Finally, statutes that restrict attorney fees, require periodic payment of awards, and codify the standard of care have not been shown to have the intended result of reducing malpractice cost indicators.

Assessment, supra note 18, at 2 (emphasis omitted).

- 176. See Assessment, supra note 18, at 65 (citing Stephen Zuckerman et al., Effects of Tort Reforms and Other Factors on Medical Malpractice Insurance Premiums, 27 INQUIRY 167 (1990)).
- 177. See Assessment, supra note 18, at 65 (citing Zuckerman, supra note 176, and Glenn Blackmon & Richard Zeckhauser, State Tort Reform Legislation: Assessing Our Control of Risks, TORT LAW AND THE PUBLIC INTEREST (1991)).
- 178. See Assessment, supra note 18, at 15 (citing GENERAL ACCT. OFF., MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS (1986)). This GAO report reflected no impact on claim frequency, payment per paid claim or insurance premiums due to shortened statutes of limitation for minors. Assessment, supra note 18, at 66.
- 179. PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 39 (1991). See Turkington, supra note 20, at 1308-17; see, e.g., Douglas v. Stallings, M.D., Inc., 870 F.2d 1242 (7th Cir. 1989).
- 180. 51 AM. JUR. 2d Limitation of Actions § 27 (1970). See, e.g., Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).
- 181. See IND. CODE § 34-1-2-2 (1988) (providing for a two-year statute of limitation for personal injury claims); IND. CODE § 34-1-2-5 (1988) (providing a tolling period: a person "under legal disabilities when the

not use suspect or quasi-suspect classifications. Similarly, federal due process objections have been rejected. 183

The United States Supreme Court has stated that "the [C]onstitution of the United States... gives to minors no special rights beyond others, and it [is] within the legislative competency of the state... to make exception in their favor or not."<sup>184</sup>

#### B. State Constitutional Challenges

State constitutional challenges to shortened medical malpractice statutes of limitation as they apply to minors have met with success in various states. Several states have found such statutes to be unconstitutional. State courts have greater discretion and authority than federal courts to declare a state's law unconstitutional. When interpreting individual rights, state courts may interpret their own state constitutions more expansively than the federal courts have interpreted the United States Constitution. This expansiveness is because the Supremacy Clause of the Constitution establishes a minimum, not a maximum, level for interpretation by a state court of those individual rights. State constitutions typically expand upon the rights enumerated in the Constitution.

cause of action accrues may bring his action within two (2) years after the disability is removed"); IND. CODE § 34-1-67-1 (1988) (defining the phrase "under legal disabilities" to include persons less than eighteen years old). Section 34-1-67-1 was replaced by IND. CODE ANN. § 34-1-67-5 (West 1993) (stating that "the provisions of this article shall be liberally construed and shall not be limited by any rules of strict construction"). Thus, for personal injury claims, a disabled person has two years in which to bring suit after the disability, as defined by court, is removed. There was a potential conflict with § 16-9.5-3-1 as originally enacted because a person had two years after his or her eighteenth birthday in which to bring a tort claim, but was limited for medical malpractice claims. However, the Indiana Supreme Court, in Johnson v. St. Vincent Hospital, 404 N.E.2d 585 (Ind. 1980), stated that due to the irreconcilable conflict between § 34-1-2-2 and § 16-9.5-3-1, the latter statute controls. Johnson, 404 N.E.2d at 603. Thus, now § 27-12-7-1 (replacing § 16-9.5-3-1) controls.

- 182. WEILER, *supra* note 179, at 39 & n.100.
- 183. WEILER, supra note 179, at 39 & nn.101-05.
- 184. Vance v. Vance, 108 U.S. 514, 521 (1883). See Robbins v. United States, 624 F.2d 971 (10th Cir. 1980) (rejecting a complaint that the Federal Tort Claims Act's statute of limitation, treating minors the same as adults, violated the Constitution).
- 185. Tort Reform, *supra* note 42, at 29. *See* Turkington, *supra* note 20, at 1317-22; Alston, *supra* note 52.
- 186. See, e.g., Barrio v. San Manuel Div. Hosp., 692 P.2d 280 (Ariz. 1984) (holding a statute unconstitutional under state's constitutional guarantee of right to recover for injury); Austin v. Litvak, 682 P.2d 41 (Colo. 1984) (holding a statute unconstitutional under equal protection guarantee); Strahler v. St. Luke's Hosp., 706 S.W.2d 7 (Mo. 1986) (holding that a statute violates guarantee of open access to courts); Carson v. Maurer, 424 A.2d 825 (N.H. 1980) (holding that a statute violates state's constitution's equal protection guarantee under intermediate scrutiny test); Mominee v. Scherbarth, 503 N.E.2d 717 (Ohio 1986) (holding that a statute violates due course of law guarantee under rational basis test); Lyons v. Lederle Labs., 440 N.W.2d 769 (S.D. 1989) (holding that a statute violates equal protection guarantee under rational basis test); Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) (holding that a statute violates open court guarantee).
  - 187. Smith, supra note 54, at 208 (discussing the various reasons for this greater state court authority).
  - 188. Turkington, supra note 20, at 1321.

Challenges to the medical malpractice statutes rely on several constitutional objections including: "(1) equal protection and due process guarantees . . . , (2) prohibitions against special legislation, (3) the right to trial by jury, (4) right of access to courts, and (5) usurpation of the judicial function." As one commentator noted:

State legislatures reacted in the 1970's to a perceived crisis in medical malpractice insurance by enacting these types of limitations provisions. While such provisions no doubt go some distance in alleviating the problems of malpractice insurance and health care providers, they do so only at a high cost. Their effect is to bar the malpractice suits of minors without regard to the validity of their claims or the fact that the minors are wholly innocent in failing to timely pursue their claims. Such a result seems to unfairly penalize the blameless minor in order to protect the potentially negligent health care provider.<sup>190</sup>

Several states adhere to this view, upholding state constitutional challenges to their medical malpractice statute of limitation.<sup>191</sup>

1. Due Process and Open Court Guarantees.—States typically have constitutional due process guarantees similar to those in the United States Constitution. Although challenges to statutes as violating due process guarantees have been met with mixed success, several states have upheld such challenges. The Ohio Supreme Court found such a challenge to be valid. In Schwan v. Riverside Methodist Hospital, <sup>192</sup> the court held that Ohio's medical malpractice statute of limitation, which treated minors under ten years of age differently than minors over ten years of age, violated the Ohio Constitution's equal protection guarantee. <sup>193</sup> The court stated that no rational basis supported the statute's tolling the statute of limitation for those younger than ten until their fourteenth birthday, while requiring minors older than ten to file an action within one year of the accrual of the cause of action. <sup>194</sup>

Then, in *Mominee v. Scherbarth*, <sup>195</sup> in a five to two decision, the Ohio Supreme Court held that the four year limitation was unconstitutional as applied to minors because it violated the due process and due course of law guarantees. <sup>196</sup> The *Mominee* court stated

<sup>189.</sup> Smith, *supra* note 54, at 213.

<sup>190.</sup> Thea Andrews, Infant Tolling Statutes in the Medical Malpractice Cases: State Constitutional Challenges, 5 J. LEGAL MED. 469, 486 (1984).

<sup>191.</sup> See, e.g., Mominee v. Scherbarth, 503 N.E.2d 717, 723 (Ohio 1986) (quoting Andrews, supra note 190).

<sup>192. 452</sup> N.E.2d 1337 (Ohio 1983).

<sup>193.</sup> Id. at 1338-39.

<sup>194.</sup> *Id.* at 1338.

<sup>195. 503</sup> N.E.2d 717 (Ohio 1986).

<sup>196.</sup> Ohio Const. art. I, § 1 (providing: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."); Ohio Const. art. I, § 16 (stating in relevant part: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."). See also Mominee, 503 N.E.2d at 726-27 (Clifford, J., concurring) (stating: "A statute which violates the open court

that a statute is "valid on due process grounds [1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary." First, the court found that the legislative goals of the statute were to insure health care availability to Ohio citizens by reducing medical malpractice insurance premiums, and to prevent stale claims. The court found these goals proper. However, it determined that no real and substantial relationship existed between those goals and the statute as applied to minors because the defendant health care providers failed to proffer any evidence that the statute of limitation as applied to minors had any effect on insurance premiums or that malpractice claims by minors even constituted a significant part of all the medical malpractice claims. 198

The *Mominee* court also found that the statute of limitation as applied to minors was "totally unreasonable and patently arbitrary." The court stated that the Ohio Constitution's Due Process/Due Course of Law Provisions, which guarantee that all courts are open to everyone who is injured, were violated by the statute of limitation, which effectively barred minors from the courts because they could not bring suit before reaching majority and they would lose their right to redress before reaching majority. 200 For various reasons, the court rejected the assertion that a minor's suit could be brought by their parent or guardian. One reason was that parents may be unaware of the existence of any medical malpractice problems because of children's inherent inability to recognize or articulate their physical problems. Additionally, "the parents may themselves be minors, ignorant, lethargic, or lack the requisite concern to bring a malpractice action within the time provided by statute." Finally, the minor might not have a parent or a concerned guardian. 202

Next, the *Mominee* court rejected the appellate court's reasoning that children could sue their parents, due to the abolition of parental immunity in Ohio, for failing to file suit in the child's behalf.<sup>203</sup> The court stated that being forced to choose between suing their parents and abandoning their claims effectively chills children's due process rights.<sup>204</sup> Additionally, because the evidentiary concerns of stale medical malpractice claims remain for such a suit against a parent, the statute of limitation "would not advance its ostensible goal of preventing stale claims."<sup>205</sup> Moreover, putting the parents in this dilemma may prompt purely speculative claims. And as protector of their child's possible law suit, the physician-parent relationship becomes adversarial, eroding the essential mutual

provision... is also in violation per se of the due course of law provision... of the Ohio Constitution." The judge also noted that the statute additionally violated the due process and equal protection clauses of the Constitution.).

<sup>197.</sup> *Mominee*, 503 N.E.2d at 720-21 (quoting Benjamin v. Columbus, 146 N.E.2d 854, 856 (Ohio 1957)).

<sup>198.</sup> Id. at 721.

<sup>199.</sup> *Id*.

<sup>200.</sup> Id.

<sup>201.</sup> Id. (citing Sax v. Votteler, 648 S.W. 2d 661 (Tex. 1983)).

<sup>202.</sup> Mominee, 503 N.E.2d at 721-22.

<sup>203.</sup> Id. at 722.

<sup>204.</sup> *Id*.

<sup>205.</sup> Id.

confidence of the physician-patient relationship.<sup>206</sup> "Thus the ultimate goal of [the statute of limitation], the advancement of health care to Ohioans, would be frustrated."<sup>207</sup>

In his dissent, Justice Wright referred to published opinions and statistics that seemed to support the validity and wisdom of the legislature's enactment of the statute of limitation as a way to end the problems of stale claims and long-tail liability.<sup>208</sup> The court rejected Justice Wright's view, stating that the legislature may enact legislation to meet perceived needs, but the legislation still must comply with constitutional provisions.<sup>209</sup> As one commentator noted: "[I]f anyone invokes in an American court law which the judge considers contrary to the Constitution, he can refuse to apply it. This is the only power peculiar to an American judge, but great political influence derives from it."<sup>210</sup>

The *Mominee* court restored the "disabilities" tolling statute; thus, minors with a cause of action arising before their majority have until their nineteenth birthday to file their suit.<sup>211</sup> Minors discovering the alleged medical malpractice after their eighteenth birthday have one year or until their twenty-second birthday, whichever is first, to file a suit.<sup>212</sup>

As noted in *Mominee*, several other jurisdictions have upheld similar due process challenges to medical malpractice statutes of limitation as applied to minors. The Arizona Supreme Court held the statute of limitation to be unconstitutional because it abolished the fundamental right to recover damages through a common law action.<sup>213</sup> In Missouri, the court determined that the statute of limitation unconstitutionally deprived a minor of the guarantees of a court open to everyone, and of a certain remedy afforded for every injury to a person.<sup>214</sup> Texas, treating the open court constitutional guarantee as synonymous with due process, found the statute to be in violation of the guarantee.<sup>215</sup>

Although the above jurisdictions do not allow minors to bring suit in their own name, the difference from Indiana's rule, which allows minors to file suit, is immaterial when evaluating the constitutionality of Indiana's applicable medical malpractice statute of limitation. As mentioned in *Rohrabaugh v. Wagoner*, <sup>216</sup> minors are limited in their legal capacity to do many actions which persons of majority age are allowed to do. People are prohibited from voting due to their age because they may lack the maturity to make an informed and well-considered decision. But, these same people are held responsible for

<sup>206.</sup> Id.

<sup>207.</sup> Mominee, 503 N.E.2d at 722.

<sup>208.</sup> Id. at 736.

<sup>209.</sup> Id, at 722 n.4.

<sup>210.</sup> ALEXIS DETOCQUEVILLE, DEMOCRACY IN AMERICA 102 (1969). See Smith, supra note 54, at 229.

<sup>211.</sup> Mominee. 503 N.E.2d at 723.

<sup>212.</sup> Id.

<sup>213.</sup> Barrio v. San Manuel Div. Hosp., 692 P.2d 280 (Ariz. 1984).

<sup>214.</sup> Strahler v. St. Luke's Hosp., 706 S.W.2d 7 (Mo. 1986). See Draper, supra note 51, at 735. See generally John F. Applequist, Will Missouri's 'Open Courts' Guarantee Open the Door to Adoption of the 'Discovery Rule' in Medical Malpractice Cases? Strahler v. St. Luke's Hospital, 52 Mo. L. Rev. 977 (1987).

<sup>215.</sup> Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983). See Christopher J. Volkmer, Limitation of Actions—Disability of Infancy—Medical Malpractice statute which Prevents Tolling of Limitations During Infancy Violates Due Process Clause of Texas Constitution, 15 St. MARY'S L.J. 207 (1983).

<sup>216. 413</sup> N.E.2d 891 (Ind. 1980); see supra subpart II.B.2.

failing to comply with the medical malpractice statute of limitation, just because they—minors—may file suit. Arguably, voting and filing a timely and proper claim require an equal level of maturity. Thus, denying minors the right to vote while requiring them to fulfill the responsibility of complying with the statute of limitation seems unreasonable. One can only speculate as to whether legislatures would subject minors to these statutes of limitation if minors had voting rights. Because of their inherent limitations, the legal right of minors to file suit in Indiana should not be a factor in support of the constitutionality of Indiana's medical malpractice statute of limitation as it applies to minors.

- 2. Equal Protection Guarantee.—
- a. Rational basis test.—In Lyons v. Lederle Laboratories,<sup>217</sup> a South Dakota case, eighteen-year-old Jody Lyons brought a medical malpractice action against the estate of Dr. Heidepriem alleging negligent care while Jody was a minor. In 1977 South Dakota's legislature enacted the statute which required actions to be:

[C]ommenced only within three years after the alleged malpractice, error or mistake or failure to cure occurred, unless the minor is less than six years of age at the time of the alleged malpractice, error, mistake or failure to cure in which case the action shall then be commenced within two years after the sixth birthday of the minor.<sup>218</sup>

Per the statute, the time had run to bar Lyons' claim. In a three to one decision, the court used the rational basis test and held that the statute of limitation provision violated the equal protection guarantees of the South Dakota and Federal Constitutions.<sup>219</sup> The court found the statute's classification to be arbitrary and not rationally related to the legitimate purpose of the statute, which was to alleviate the problems of the perceived medical malpractice crisis.<sup>220</sup>

After discussing the three tests used for judicial scrutiny, which are applied depending upon the nature of the interest, the court held "that the rational basis test is most appropriate in this case involving age classification."<sup>221</sup> The court's rational basis test has two prongs, which ask: "(1) [W]hether the statute does set up arbitrary classifications among various persons subject to it. (2) [W]hether there is a rational relationship between the classification and some legitimate legislative purpose."<sup>222</sup> Applying the test's first prong, the court labeled the case a "classic example of the arbitrariness of the classification."<sup>223</sup> The court found that the statute did not apply equally to all people, because it created "an arbitrary classification of minors who have medical malpractice claims as opposed to minors with any other kind of tort claim."<sup>224</sup>

<sup>217. 440</sup> N.W.2d 769 (S.D. 1989).

<sup>218.</sup> Id. at 770 (citing S.D. CODIFIED LAW § 15-2-22.1 enacted by the 1977 legislature).

<sup>219.</sup> Id. at 771, 772.

<sup>220.</sup> Id. at 771.

<sup>221.</sup> *Id*.

<sup>222.</sup> Lyons, 440 N.W.2d at 771 (citing City of Aberdeen v. Meidinger, 233 N.W.2d 331, 333 (S.D. 1975)).

<sup>223.</sup> Id.

<sup>224.</sup> Id.

Minors with other types of tort claims have until one year after their eighteenth birthday to file their claims.<sup>225</sup>

Applying the test's second prong, the court determined that the legislation was enacted to alleviate a perceived malpractice crisis and insure health care availability to the South Dakota citizens.<sup>226</sup> The court found no rational basis for assuming that requiring suits to be filed earlier would reduce medical malpractice claims.<sup>227</sup>

The Lyons court referred to Schwan v. Riverside Methodist Hospital, which had used the same basic reasoning to strike down, on state equal protection grounds, a similar statute of limitation which was based upon the age of ten instead of six. Lyons quoted Schwan, stating:

[W]e recognize that the [legislature] often must draw lines in legislation. Yet, it is the age of majority which establishes the only rational distinction. Young people eagerly anticipate their legal 'adulthood.' At the age of majority, our society puts them on notice that they are assuming an array of rights and responsibilities which they never had before. Age ten, however, arrives with little fanfare. It is difficult to imagine that parents or guardians—much less the children themselves—would recognize that any change in status occurs on a child's tenth birthday. We acknowledge, however, the importance of the purpose of [the statute] to alleviate the 'medical malpractice crisis' of the mid-1970's . . . . Therefore, in light of our conclusion that [the statute] creates an irrational classification which does not rationally further the purpose of [the legislation], we hold that [it] is unconstitutional on its face with respect to medical malpractice litigants who are minors. 228

Like Rohrabaugh, both the Lyons and Schwan courts noted the inherent limited abilities of minors. However, unlike Rohrabaugh, Lyons and Schwan found that expecting and requiring minors to be able to comply with the statute of limitation was irrational. Additionally, neither the Lyons court nor the Schwan court was able to find a rational purpose for the legislative differentiation of this class of minors.

b. Intermediate test.—New Hampshire used the intermediate level of equal protection scrutiny to hold that the medical malpractice statute of limitation provision applying to minors was unconstitutional in Carson v. Maurer.<sup>229</sup> Like Indiana's statute, minors aged eight and above were required to comply with the same two year statute of limitation time period as that applicable to adults.<sup>230</sup> The medical malpractice statutes were enacted to reduce liability insurance costs and insure the availability of adequate liability insurance for health care providers.<sup>231</sup>

<sup>225.</sup> Id.

<sup>226.</sup> Id.

<sup>227.</sup> Lyons, 440 N.W.2d at 772.

<sup>228.</sup> Id. (quoting Schwan v. Riverside Methodist Hosp., 452 N.E.2d 1337, 1339 (Ohio 1983)).

<sup>229. 424</sup> A.2d 825 (N.H. 1980). *See* Turkington, *supra* note 20, at 1328-30; Draper, *supra* note 51, at 780-81; Andrews, *supra* note 190, at 484-86.

<sup>230.</sup> Carson, 424 A.2d at 833 (citing N.H. REV. STAT. ANN. 507-C:4 (Supp. 1979)).

<sup>231.</sup> Id. at 830.

First, the court held that the right to recover for one's injuries is not a fundamental right, <sup>232</sup> and no suspect classification was created. Thus, the strict scrutiny test was not required. The *Carson* court chose the intermediate level of review after determining that the right to recover for personal injuries was "sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test." *Carson* recognized that the Supreme Court restricts this intermediate level test, also known as the fair and substantial relationship test, to classifications based on gender and illegitimacy. However, the court recognized its right, when interpreting the state constitution, to grant more freedoms than the federal Constitution requires. <sup>235</sup>

Under the intermediate level of review, the statutes' classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."<sup>236</sup> The court's function is "not to second-guess the wisdom of or necessity of legislation."<sup>237</sup> Rather, its function is to determine whether the legislature could reasonably find the factual basis for the classifications to be true.<sup>238</sup> The court found that the legislature had sufficient facts to determine that special legislation was required.<sup>239</sup> Consequently, the issues became whether the statute had a fair and substantial relation to the legislative goal and whether unreasonable limitations were placed on private rights.

First, the *Carson* court determined that the medical malpractice statute of limitation did not "substantially further" the legislative goal of reducing liability insurance costs because the number of malpractice claims filed by or for minors was comparatively small.<sup>240</sup> Second, the court noted that previously New Hampshire's saving statute allowed all minors to bring their action within two years after their disability was removed.<sup>241</sup> But now, only the class of medical malpractice claimants was denied the saving statute's protection. Also, the statute of limitation extinguished causes of action before minors, due to their age, may have learned that they even exist. The *Carson* court found that the medical malpractice statute of limitation "unfairly burdens and discriminates" against these minors and "is unconstitutional insofar as it extinguishes rights conferred by" the saving statute.<sup>242</sup> *Carson* did not state that the legislature failed to rationally further the purpose of the statute. Rather the court found that the classification did not further the legislative goals enough to justify such a limitation on minors' rights.

The Carson court held virtually every aspect of New Hampshire's medical malpractice reform to be in violation of the state's constitution. This case illustrated the

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232. Id.
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<sup>233.</sup> Id.

<sup>234.</sup> Id. at 831.

<sup>235.</sup> Carson, 424 A.2d at 831; see supra notes 187-88 and accompanying text.

<sup>236.</sup> Carson, 424 A.2d at 831 (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

<sup>237.</sup> Id.

<sup>238.</sup> Id. (citing Vance v. Bradley, 440 U.S. 93, 111 (1979)).

<sup>239.</sup> Id.

<sup>240.</sup> Id. at 834.

<sup>241.</sup> Carson, 424 A.2d at 833.

<sup>242.</sup> Id. at 833-34.

major constitutional problems of the reform legislation of the mid-1970s. First, the empirical data is inadequate to show that the reduced costs, which result from such reforms, will provide greater availability of reasonably priced insurance. Secondly, as *Carson* noted, "basic notions of fairness and justice" are offended and "[s]ociety cannot escape its responsibility to provide justice by simply eliminating the rights of its citizens."<sup>243</sup>

The court also recognized the unfairness of requiring minors, a group that is disadvantaged and represents a relatively small number of the injured victims of medical malpractice, to bear the burden of a perceived insurance crisis. Recognizing this unfairness, the *Carson* court used its authority to constitutionally invalidate legislation. The court applied a modified federal intermediate level test, and then used its authority to return and to grant more freedoms to individual citizens.

The same factors that faced the *Carson* court also faced the 1980 Indiana Supreme Court in *Rohrabaugh v. Wagoner*.<sup>244</sup> Both courts discussed the harshness of the medical malpractice statute of limitation for minors. Both courts dealt with the same empirical data that was available to the legislatures of the mid-1970s. Yet, only *Carson* found a way to continue the historical protection afforded minors by relieving them of the statutory obligation. Now, the Indiana Supreme Court may be trying to follow the example by sending a message to the legislature to provide more medical malpractice protection to minors.<sup>245</sup>

#### IV. FEDERAL STATUTORY CHALLENGE

The Americans with Disabilities Act of 1990 (ADA) is a viable, yet currently untested, legal device that should be used to challenge various states' medical malpractice statutes of limitation as they apply to minors.<sup>246</sup> The ADA was enacted "[t]o establish a clear and comprehensive prohibition of discrimination on the basis of disability."<sup>247</sup> Title II, Subchapter A of the ADA specifically deals with the public services area and the prohibition against discrimination of persons with disabilities.<sup>248</sup> This Subchapter became effective on January 26, 1992.<sup>249</sup> It covers "public entit[ies]," which include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government."<sup>250</sup> Thus, public entities must adhere to the requirement that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the

- 243. Id. at 838.
- 244. 413 N.E.2d 891 (Ind. 1980); see supra part II.B.2.
- 245. See supra subpart II.B.5.
- 246. 42 U.S.C.A. §§ 12101-12213 (West 1994).
- 247. S. 933, 101st Cong., 2d Sess. (1990).
- 248. 42 U.S.C.A. §§ 12131-12134 (West 1994).
- 249. 42 U.S.C.A. § 12131, Note (Other Provisions). Subchapter A "shall become effective 18 months after the date of enactment of this Act [July 26, 1990]" and § 12134 "shall become effective on the date of [the] enactment of this Act." *Id*.
  - 250. 42 U.S.C.A. § 12131(1)(A)-(B).

services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."<sup>251</sup>

The Attorney General is responsible for promulgating regulations to implement Subchapter A.<sup>252</sup> The regulations dictate that Title II applies to the activities of executive agencies, as well as those of "the legislative and judicial branches of State and local governments."<sup>253</sup> The regulations define disability, "with respect to an individual, [as] a physical or mental impairment that substantially limits one or more of the major life activities of such individual."<sup>254</sup> Age is such a disability as reflected by the fact that age clearly restricts minors' ability to do many life activities that persons of majority age can do.<sup>255</sup> Such restrictions include the lack of ability to independently manage their own legal affairs.<sup>256</sup> Also, state courts have recognized that minors, due to age, are under a legal disability.<sup>257</sup> Thus, Title II applies to legislative enactments such as medical malpractice statutes of limitation applying to minors.

The application of Title II to such enactments is further evidenced by the fact that statutes of limitation affect minors' abilities to pursue their claims in the judiciary, which is expressly covered by Title II. Furthermore, a major activity covered by the regulation includes "programs that provide State or local government services or benefits." Additionally, a state's court system can be considered such a program providing both a service and a benefit to individuals, especially in lieu of states' constitutional provisions granting individuals the right of access to state courts. States' medical malpractice statutes of limitation are preempted by the ADA, which establishes the minimum level of protection to individuals with disabilities. Thus, state statutes that restrict the ability

- 251. Id. § 12132.
- 252. Id. § 12134(a).
- 253. 28 C.F.R. § 35.102, App. A (1994). The miscellaneous provisions of the ADA provide:

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

#### 42 U.S.C.A. § 12202.

- 254. 28 C.F.R. § 35.104.
- 255. See supra text accompanying notes 102-03.
- 256. See supra subpart II.A.; text accompanying note 200.
- 257. South Bend Community Sch. Corp. v. Widawski, 622 N.E.2d 160, 162 (1993). *See supra* subpart II.B.5.
  - 258. 28 C.F.R. § 35.102, App. A (1994).
  - 259. See, e.g., supra note 6.
- 260. See 28 C.F.R. § 35.103. Title II, Subchapter A "does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them."

  Id. State laws that require minors to comply with medical malpractice statutes of limitation accord minors less protection than that provided under most tort statutes of limitation and less protection than persons of majority age with medical malpractice claims are afforded. See supra note 51 and accompanying text; subpart II.A.

of minors to wait until they have reached the age of majority to bring their medical malpractice claims violate the ADA. This conclusion furthers the stated purpose of the ADA—to prohibit discrimination based on disabilities.<sup>261</sup>

One analogous case is Concerned Parents to Save Dreher Park Center v. City of West Palm Beach. In Concerned Parents, the city of West Palm Beach, Florida, (the "City") had provided recreational programs at the Dreher Park Center for persons with disabilities. However, in 1993, due to budget constraints the City eliminated the programs for persons with disabilities, and the plaintiffs sought injunctive relief. The case was removed to federal court pursuant to jurisdiction conferred by the ADA. The court noted that the plaintiffs had to pass a three part test to establish a violation of Title II. After finding that the plaintiffs satisfied the "disability" prong, the court found that such disabled individuals were discriminated against by the City.

The court noted that the ADA bans both intentional acts of discrimination and actions that have discriminatory effects. Significantly, the court noted that even if a governmental entity is not required to offer a program, when it does then the program must be conducted such that its purpose or effect does not impair "its objectives with respect to individuals with disabilities." The court found that the elimination of the programs effectively impaired the City's goal of providing recreation services for disabled individuals. Such impairment occurred because disabled individuals were unable to benefit from the remaining general programs. The court in *Concerned Parents* noted that the ADA requires public entities to "provide 'integrated settings' for services and programs," or "separate benefits or services . . . if they are 'necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others." By eliminating the special programs, and due to the inadequacy of the general programs, the City had excluded disabled persons from being

Because these state laws do not provide equal or greater protection for minors, they are preempted by the ADA.

- 261. See supra note 247 and accompanying text.
- 262. 846 F. Supp. 986, consent decree entered, 853 F. Supp. 424 (S.D. Fla. 1994).
- 263. Id. at 988.
- 264. Id. at 989.
- 265. Id. (The court also based jurisdiction on 28 U.S.C. §§ 1331, 1441 (1988 & Supp. V 1993).).
- 266. Id. at 989-90.
- [A] plaintiff must show: (1) that he is, or he represents, the interests of a 'qualified individual with a disability'; (2) that such individual was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and
- (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.

#### Id. at 990.

- 267. Concerned Parents, 846 F. Supp. at 990-91.
- 268. Id. at 991 (citing 28 C.F.R. § 35.130(b)(3) (1993)).
- 269. Id.
- 270. Id.
- 271. Id.
- 272. Concerned Parents, 846 F. Supp. at 991 (quoting 28 C.F.R. § 35.130(d) (1993)).
- 273. *Id.* (quoting 28 C.F.R. § 35.130(b)(1)(iv) (1993)).

able to benefit from the City's recreation services. Such exclusion violated the second prong of the court's Title II test.<sup>274</sup>

The court in *Concerned Parents* found that the elimination of the benefits was due to the plaintiffs' disabilities.<sup>275</sup> The court noted that although Title II does not per se require particular services for disabled persons, it does require that services being made available to non-disabled individuals must be made equally available to disabled individuals.<sup>276</sup> Thus, since a great disparity in the amount of funds provided for disabled persons and non-disabled persons existed, the court found that the denial of benefits was due to the plaintiffs' disabilities.<sup>277</sup> The court in *Concerned Parents* held that the plaintiffs had "shown a substantial likelihood of prevailing on the merits of the ADA claim."<sup>278</sup>

Concerned Parents serves as persuasive precedent for using Title II to invalidate states' medical malpractice statutes of limitation for minors. First, minors are under the legal disability of age.<sup>279</sup> Second, due to concerns of increased medical malpractice insurance costs, states enacted laws changing the statutes of limitation for minors to bring such claims, thus eliminating minors' traditional common-law right to toll statutes of limitation until reaching the age of majority.<sup>280</sup> Through state constitutional provisions, each individual has the right to his or her day in court.<sup>281</sup> By eliminating minors' rights to toll statutes of limitation until the age of majority, states have effectively impaired their ability to exercise their constitutional right of access to courts.<sup>282</sup> At the very least, medical malpractice statutes of limitation containing shortened or eliminated tolling periods for minors discriminate against minors by failing to treat them equally with persons of majority age who are better able to manage their legal matters.

Third, the change in tolling laws for minors was made specifically because of the unique problems associated with minors' disability—age.<sup>283</sup> Thus, these medical malpractice statutes of limitation for minors meet the *Concerned Parents* three prong test, and are in violation of Title II of the ADA.

#### **CONCLUSION**

In the case of medical malpractice statutes of limitation for minors, the ends do not justify the means. The legislatures of the mid-1970s enacted legislation when they were faced with a perceived medical malpractice crisis. Requiring minors to carry their present burden resulting from the medical malpractice reform is an unfair and unreasonable social

- 274. Id. at 992.
- 275. Id.
- 276. Id.
- 277. Concerned Parents, 846 F. Supp. at 992.
- 278. Id. at 992.
- 279. See supra subpart II.A.; text accompanying notes 102-03; text accompanying note 200; subpart II.B.5; note 257 and accompanying text.
  - 280. See supra subpart I.B.; note 51 and accompanying text.
  - 281. See, e.g., supra note 6.
  - 282. See supra subpart II.A.; text accompanying note 200.
  - 283. See supra notes 51-52 and accompanying text.

policy. Requiring minors, who lack the physical, mental and emotional skills to drive a car, to file a suit within the prescribed time period or lose the right to recover for their injuries is inequitable. These statutes harm minors and protect the potentially negligent physician or health care worker. We as a society should be willing to find a way to relieve minors of this burden, or at least make the burden more tolerable for them to bear.

State courts are split on the issue of whether the statutes of limitation are unconstitutional. State courts use different standards of review, and some courts even apply the same standard differently with different results. The better position is the one that strikes down the statutes as being unconstitutional. Due to minors' inherent limitations, the statutes of limitation effectively bar minors from the courts. Moreover, minors under the medical malpractice statutes of limitation are treated differently than minors with other tort claims.

Courts and legislatures, especially those of Indiana, should be willing to continue the historical trend of providing protection for minors by protecting them from these unreasonable situations. Medical malpractice statutes of limitation should allow all people to have the opportunity to file their claim. This opportunity only exists when people have the personal ability to handle their legal affairs, or when someone is legally responsible and accountable for handling the affairs for them. Legislatures have the responsibility to provide this opportunity for minors. Courts should strike down any legislation that does not provide such an opportunity for minors. And now, under the ADA, minors have a federal legislative enactment that arguably requires federal courts to invalidate state statutes of limitation that require minors to bring their medical malpractice claims before reaching the age of majority.

## INDIANA'S NEGLECT OF A DEPENDENT STATUTE:\* USES AND ABUSES

KENNETH D. DWYER\*\*

#### INTRODUCTION

## A. State v. George<sup>1</sup>

At approximately one o'clock in the afternoon of March 13, 1993, in Boone County, Indiana, Karen George approached a "T" intersection when another car turned the corner short, almost colliding with Ms. George. To avoid the collision, Ms. George applied the brakes and turned toward the ditch, losing control on the icy road. She missed the other car, but spun around and landed on top of a cement abutment that protected the end of a drain pipe. Her rear wheels were off the ground, so she could not get out of the ditch. The other car did not stop to help.

Ms. George and her eleven-year-old daughter, who was with her at the time, walked to a nearby house to call for help. It was a cold day and the house belonged to friends, so Ms. George had her daughter stay at the house while she went back to the car to wait for help to arrive.

During routine questioning, the responding police officer asked if anyone had witnessed this one-car accident. Ms. George replied that other than the people in the car she had swerved to miss, only her daughter witnessed the accident. After telling the officer where her daughter was, she and the officer walked around the car to see if it had been damaged. Only then did the officer notice that Ms. George stumbled and was unsteady on her feet. He then noticed the smell of alcohol on her breath. A blood-alcohol level test showed she had 0.23 percent by weight of alcohol in her blood. She was arrested for operating a vehicle while intoxicated.<sup>2</sup> After reading the police report, the prosecutor decided to charge Ms. George not only with driving while intoxicated, a class C misdemeanor,<sup>3</sup> but also for neglect of a dependent,<sup>4</sup> a class D felony.<sup>5</sup>

- \* IND. CODE § 35-46-1-4(a) (1993).
- \*\* J.D. Candidate, 1995, Indiana University School of Law—Indianapolis; B.M., 1984, Indiana University at Fort Wayne, B.M. Ed., 1986, Indiana University at Fort Wayne.
- 1. State v. George, Trial No. 06D02-9303-CF95 (Boone County Superior Court, Criminal Division 2, tried November 21, 1993).
- 2. IND. CODE § 9-30-5-1 (1993) ("A person who operates a vehicle with at least ten-hundredths percent (0.10%) by weight of alcohol in the person's blood commits a Class C misdemeanor.").
- 3. "A person who commits a Class C misdemeanor shall be imprisoned for a fixed term of not more than sixty (60) days; in addition, he may be fined not more than five hundred dollars (\$500)." IND. CODE § 35-50-3-4 (1993).
  - 4. IND. CODE § 35-46-1-4(a) (1993).
  - 5. IND. CODE § 35-50-2-7 (1993) provides:
  - (a) A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 1/2) years, with not more than one and one-half (1 1/2) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances. In addition, he may be fined not more than ten thousand dollars (\$10,000).
  - (b) Notwithstanding subsection (a), if a person has committed a Class D felony, the court may

George is a recent example of prosecutors' creative use of Indiana's Neglect of a Dependent Statute<sup>6</sup> to protect dependents. Part I of this Note provides a detailed study of prior use of this statute. In Part II, which explores abuse of the statute, this Note examines problems that have been encountered in applying the statute. Part II further provides the outcome of the George case, and other recent applications of the statute, which demonstrate the need for revising the statute. Part III concludes this Note with a recommendation for updating the statute.

## B. Current Status of the Statute

Indiana's Neglect of a Dependent Statute states that:

- (a) A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:
  - (1) places the dependent in a situation that may endanger his life or health;
  - (2) abandons or cruelly confines the dependent;
  - (3) deprives the dependent of necessary support; or
  - (4) deprives the dependent of education as required by law;

commits neglect of dependent, a Class D felony. However, except for a violation of clause (4), the offense is a Class B felony if it results in serious bodily injury. It is a defense that the accused person, in the legitimate practice of his religious belief, provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent.<sup>7</sup>

The Indiana Code defines "person," "dependent," "support," "knowingly," "intentionally," "confine," and "serious bodily injury," while the Indiana courts have defined other terms used in this statute. The word "cruelly," used to describe a confinement, requires that the confinement "is likely to result in a harm such as

enter judgment of conviction of a Class A misdemeanor and sentence accordingly.

Id. ("A person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one (1) year; in addition, he may be fined not more than five thousand dollars (\$5000)." IND. CODE § 35-50-3-2 (1993).).

- 6. IND. CODE § 35-46-1-4(a) (1993).
- 7. Id.
- 8. "'Person' means a human being, corporation, limited liability company, partnership, unincorporated association, or governmental entity." IND. CODE § 35-41-1-22 (1993).
  - 9. IND. CODE § 35-46-1-1 (1993); see infra text accompanying notes 34-41.
  - 10. "Support' means food, clothing, shelter, or medical care." IND. CODE § 35-46-1-1 (1993).
- 11. "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." IND. CODE § 35-41-2-2(b) (1993).
- 12. "A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." IND. CODE § 35-41-2-2(a) (1993).
- 13. "As used in [the Kidnapping and Confinement] chapter, 'confine' means to substantially interfere with the liberty of a person." IND. CODE § 35-42-3-1 (1993).
- 14. "Serious bodily injury' means bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of a bodily member or organ." IND. CODE § 35-41-1-25 (1993).

disfigurement, mental distress, extreme pain or hurt, or gross degradation, and yet does not necessarily endanger the dependent's life or health." "Whether the confinement is 'cruel' is to be determined by an objective standard, based upon the nature or extent of the punishment. Thus, confinement which is unreasonable under the facts and circumstances may be 'cruel' regardless of the actor's motive." "16

The word "necessary," used to modify the support required for a dependent, is a flexible and relative adjective ranging "from mere convenience to that which is indispensable."<sup>17</sup> In the neglect of a dependent context, one court, over dissent, applied the term's plain and ordinary meaning to conclude that "necessary support is essential, indispensable or absolutely required food, clothing, shelter, and medical care; i.e., food, clothing, shelter, and medical care without which the dependent's life or health is at risk or endangered."18 This definition causes subsection (1) of the Neglect of a Dependent Statute to overlap subsection (3), but does not render subsection (1) superfluous.<sup>19</sup> Subsection (3) uses the verb "deprives," which "is used to describe the conduct of taking away, removing, or divesting."20 Subsection (1) uses the verb "places," which usually describes "the conduct of putting something in a particular position." This court, over dissent, applied the subsection (1) standard to subsection (3) and concluded that malnutrition, by itself, is not enough to support a conviction under the Neglect of a Dependent Statute.<sup>22</sup> "[T]here is a critical difference between malnutrition in the sense of poor nutrition and malnutrition which endangers or places at risk a dependent's health or life."23

In the 1985 case of *State v. Downey*, the Indiana Supreme Court held in a unanimous decision that, construed literally, the Neglect of a Dependent Statute is unconstitutionally broad and vague.<sup>24</sup> The "major part" of the vagueness in the statute is caused by the "double contingency factored into the definition of the crime by the phrase 'may endanger."<sup>25</sup> The court saved the statute from nullification by giving it a narrowing construction.<sup>26</sup> "[T]he statute is to be regarded as applying to situations that endanger the life or health of a dependent. The placement must itself expose the dependent to a danger which is actual and appreciable."<sup>27</sup>

<sup>15.</sup> Hartbarger v. State, 555 N.E.2d 485, 487 (Ind. Ct. App. 1990).

<sup>16.</sup> *Id*.

<sup>17.</sup> Ricketts v. State, 598 N.E.2d 597, 600 (Ind. Ct. App. 1992) (quoting Indiana Broadcasting Corp. v. Star Station of Ind., 388 N.E.2d 568, 573 (Ind. Ct. App. 1979)).

<sup>18.</sup> Id.

<sup>19.</sup> Id. at 600.

<sup>20.</sup> Id. at 600-01.

<sup>21.</sup> Id. at 600; but see infra text accompanying notes 58-59.

<sup>22.</sup> Ricketts, 598 N.E.2d at 601.

<sup>23.</sup> Id.

<sup>24.</sup> State v. Downey, 476 N.E.2d 121 (Ind. 1985).

<sup>25.</sup> Id. at 123.

<sup>26.</sup> Id.

<sup>27.</sup> Id.

Failure to instruct the jury that the danger to the dependent must be actual and appreciable will result in the reversal of a conviction and a remand for retrial.<sup>28</sup> However, instructions containing the statute's original "may endanger" language do not erroneously provide a jury with a lower standard of harm than is required by the *Downey* decision as long as other instructions include the *Downey* mandate that the State must prove that the defendant placed the dependant in a situation that actually and appreciably endangered the life of the dependant.<sup>29</sup> "Jury instructions must be construed as a whole, and if when so considered, they state the law fully and correctly, they are not erroneous."<sup>30</sup> The State has the burden of proving that the dependent's life is in actual and appreciable danger.<sup>31</sup>

The purpose of the Neglect of a Dependent Statute is to "authorize the intervention of the police power to prevent harmful consequences and injury to dependents. . . . Law enforcement officials need not await loss of life, limb or property, but may intervene where conduct is sufficient to warrant belief that such an ultimate harmful consequence will ensue." The goal of the statute is the protection of children. 33

#### I. USES

## A. Who Can Be a Dependent?

A significant aspect of Indiana's statute is that it is a neglect of a "dependent" statute, not a "child" neglect statute.<sup>34</sup> "Dependent" is statutorily defined as: "(1) an unemancipated person who is under eighteen (18) years of age; or (2) a person of any age who is mentally or physically disabled."<sup>35</sup> In addition to the majority of cases where the defendant is responsible for an unemancipated child under the age of eighteen, the statute has also been used against those who are responsible for the care of the mentally disabled.<sup>36</sup> and the physically disabled.<sup>37</sup> Many dependents are both physically and mentally disabled.<sup>38</sup> The disability may be a result of old age,<sup>39</sup> but not necessarily so.<sup>40</sup>

- 28. McCullough v. State, 608 N.E.2d 1009, 1010 (Ind. App. 1993).
- 29. White v. State, 547 N.E.2d 831, 835 (Ind. 1989); INDIANA JUDGES ASS'N, INDIANA PATTERN JURY INSTRUCTIONS: CRIMINAL, Instruction No. 7.09 (2d ed. 1991).
  - 30. White, 547 N.E.2d at 835.
  - 31. Dayton v. State, 501 N.E.2d 482, 484 (Ind. Ct. App. 1986).
  - 32. Downey, 476 N.E.2d at 123.
  - 33. Ware v. State, 441 N.E.2d 20, 23 (Ind. Ct. App. 1982).
- 34. But cf. Carolyn M. Trier, Note, Indiana's Criminal Treatment of Abusive Parents: Problems in Need of Solutions, 24 VAL. U. L. REV. 553, 557-64 (1990) (refers to the statute as "The Child Neglect Statute").
  - 35. IND. CODE § 35-46-1-1 (1993).
- 36. See, e.g., Lomax v. State, 510 N.E.2d 215 (Ind. Ct. App. 1987) (appellant placed her mentally disabled, adult son in conditions that constituted a health hazard); Parrish v. State, 459 N.E.2d 391 (Ind. Ct. App. 1984) (appellants confined 80-year-old man because they believed he was crazy).
- 37. See, e.g., Bean v. State, 460 N.E.2d 936 (Ind. 1984) (appellants beat adult dependent who was microcephalic, frail, and mildly retarded); Klagiss v. State, 585 N.E.2d 674 (Ind. Ct. App. 1992) (appellant convicted after death of his 80-year-old mother).
  - 38. See, e.g., Bean, 460 N.E.2d at 936; Kerlin v. State, 573 N.E.2d 445 (Ind. Ct. App. 1991).
  - 39. See, e.g., Klagiss, 585 N.E.2d at 674; Kerlin, 573 N.E.2d at 445; Parrish, 459 N.E.2d at 391.
  - 40. See, e.g., Bean, 460 N.E.2d at 936; Lomax, 510 N.E.2d at 215.

Additionally, there is no requirement that the person be adjudicated a dependent in order to apply the statute.<sup>41</sup>

## B. Who Can Be a Defendant?

While most defendants in a neglect of a dependent case are the parents of the dependent, the statute clearly states that the person charged does not have to be under any legal obligation to care for the dependent, but may be one who assumes responsibility voluntarily.<sup>42</sup> The responsibility does not have to be assumed with the authority or permission of the one who has the legal obligation.<sup>43</sup> Consequently, the statute has been used against a stepfather,<sup>44</sup> a mother's boyfriend,<sup>45</sup> a father's roommate,<sup>46</sup> and a guardian's husband.<sup>47</sup> The statute has also been used to bring charges against an intermediate care facility,<sup>48</sup> the corporation that owns an intermediate care facility,<sup>49</sup> the employees of an immediate care facility,<sup>50</sup> the medical director of a health care facility,<sup>51</sup> and the administrator of a health care facility.<sup>52</sup> All of these defendants were found to have assumed responsibility for the care of a dependent and then either inflicted injury on or failed to provide adequate care for that dependent.

## C. Is There an Act Requirement?

While most charges of neglect of a dependent are against a defendant who acts in a way that injures the dependent, action is not required by the statute. Subsections (3) and (4) of the statute define violations in terms of "depriving" the dependent of "necessary support" and of "education as required by law." Failure to provide a dependent with adequate or prompt medical care has been classified as depriving the dependent of

- 41. State v. Springer, 585 N.E.2d 27, 29-30 (Ind. Ct. App. 1992) (quoting Bean, 460 N.E.2d at 942).
- 42. IND. CODE § 35-46-1-4(a) (1993).
- 43. Dowler v. State, 547 N.E.2d 1069, 1072 (Ind. 1989).
- 44. Shoup v. State, 570 N.E.2d 1298, 1303-04 (Ind. Ct. App. 1991).
- 45. Wilson v. State, 525 N.E.2d 619, 625 (Ind. Ct. App. 1988).
- 46. Dowler, 547 N.E.2d at 1071-72.
- 47. Bean v. State, 460 N.E.2d 936, 942 (Ind. 1984).
- 48. State v. Monticello Developers, Inc., 502 N.E.2d 927 (Ind. Ct. App. 1987), vacated, 527 N.E.2d 111 (Ind. 1988) (intermediate care facility for the mentally retarded and the developmentally disabled was charged with neglect of a dependent when a retarded resident was burned when left unattended in a bathtub filled with hot water).
- 49. *Id.* at 932 (corporation charged using an agency relationship theory when the offense was committed by the corporation's agent acting within the scope of the agent's authority).
  - 50. Id. at 929.
- 51. Kerlin v. State, 573 N.E.2d 445, 446-47 (Ind. Ct. App. 1991) (appellant served as a medical consultant to a nursing home, provided medical care to each of the patients at least once a month, and was charged when two patients had to be hospitalized when they did not recover from problems for which appellant had administered treatment); see infra text accompanying notes 66-69.
- 52. State v. Springer, 585 N.E.2d 29 (Ind. Ct. App. 1992) (this charge is based on the same facts that lead to the charge in *Kerlin*, a companion case); see infra text accompanying notes 70-73.
  - 53. IND. CODE § 35-46-1-4-(a)(3) (1993).
  - 54. IND. CODE § 35-46-1-4-(a)(4) (1993).

necessary support<sup>55</sup> and also as "placing" the dependent in a situation of actual and appreciable danger under subsection (1).<sup>56</sup> While seemingly requiring an act, subsection (1)<sup>57</sup> has been interpreted to encompass inactions as well as positive actions. An example of inaction that a court interpreted as a placement occurred when a parent allowed a child to remain in a living arrangement knowing that the child was being abused and did nothing to prevent the abuse.<sup>58</sup> This placement, whether from an act or an inaction, need not be for any specific length of time.<sup>59</sup> It could be a continuous dangerous condition, a pattern of abuses over a long period of time, or a one-time situation of very brief duration.<sup>60</sup> But the situation, at a minimum, must place the dependent's life or health at risk or in danger.<sup>61</sup>

There is a limit, however, as to how far a court will go in finding a voluntary assumption of the care of a dependent and in allowing a conviction for failing to act. In Fisher v. State, 62 a defendant allowed a custodial parent and that custodial parent's dependent to move into the defendant's home, knowing that the custodial parent was physically abusing the dependent. The court found the defendant not guilty of neglect of a dependent even though the defendant did not report the abuse. While such a defendant could be found to have voluntarily assumed the care of the dependent by providing a home, food, and services, and the child could also be found to have been in a dangerous situation by living with an abusive parent, the Fisher court concluded that the defendant had not "placed" the dependent in that dangerous situation. The defendant did not have the authority to separate the parent from the dependent, so the only alternative was to report the abuse. The court held that failure to report the abuse in this case was not enough to establish that the defendant knowingly or intentionally "placed" the defendant in a dangerous situation as required by the Neglect of a Dependent Statute. 64

The *Fisher* circumstances are very different from the situation where the parent moves into the home of a person who then abuses the child and the parent does nothing. Since the parent has the legal care of the dependent, failure to act constitutes neglect.<sup>65</sup>

In a contrasting case, however, the court in *Kerlin v. State* went quite far in applying the Neglect of a Dependent Statute to a physician who allegedly was negligent in providing care for elderly patients who lived in a health care facility.<sup>66</sup> The physician was

<sup>55.</sup> See, e.g., Hall v. State, 493 N.E.2d 433, 436 (Ind. 1986); Ricketts v. State, 598 N.E.2d 597, 601 (Ind. Ct. App. 1992).

<sup>56.</sup> See, e.g., Hall, 493 N.E.2d at 436; Kerlin v. State, 573 N.E.2d 445, 448 (Ind. Ct. App. 1991); Johnson v. State, 555 N.E.2d 1362, 1366 (Ind. Ct. App. 1990); Lomax v. State, 510 N.E.2d 215, 219-20 (Ind. Ct. App. 1987); Dayton v. State, 501 N.E.2d 482, 483-84 (Ind. Ct. App. 1986).

<sup>57.</sup> IND. CODE § 35-46-1-4-(a)(1) (1993).

<sup>58.</sup> Wilson v. State, 525 N.E.2d 619, 623 (Ind. Ct. App. 1988).

<sup>59.</sup> Lomax, 510 N.E.2d at 220.

<sup>60.</sup> Wilson, 525 N.E.2d at 624.

<sup>61.</sup> Id. at 625.

<sup>62. 548</sup> N.E.2d 1177 (Ind. Ct. App. 1990).

<sup>63.</sup> Id. at 1179.

<sup>64.</sup> *Id.* at 1179-80.

<sup>65.</sup> Wilson, 525 N.E.2d at 623.

<sup>66.</sup> Kerlin v. State, 573 N.E.2d at 445 (Ind. Ct. App. 1991). Charges of neglect of a dependent were

the medical director at a nursing home and provided medical care to each of the patients at least once a month. The two indictments alleged that the physician was negligent when one patient died from gangrene after the physician had been consulted and another was hospitalized for treatment of a chronic eye infection and toe infection two weeks after the physician had treated the patient. There is no question that these elderly patients were physically disabled and thus dependents, but the court took a large step in saying that they were the medical director's dependents.<sup>67</sup>

In contrast to cases where a defendant was charged with neglect for failing to seek medical treatment for dependents who were in need, 68 the physician in *Kerlin* did provide medical care for the patients. He correctly diagnosed their conditions and ordered appropriate treatment for them, relying on the nursing home staff to carry out the treatment and monitor the situations. In regard to the patient suffering from gangrene, the physician saw the patient on several occasions and transferred her to the more intensive care of a hospital and other physicians when he thought it was necessary. The patient then died after the family chose not to amputate the gangrenous limb. As for the other patient, the treatment did not cure the problem, but the chronic eye infection required further attention, and the toe infection was at least partially a result of the patient's own behavior. The physician was not responsible for the conditions suffered by either of these patients. The nursing home staff and the families had more contact with these patients than the physician. Although, the physician treated the patients appropriately and then transferred them to the hospital for more help when they did not respond to the treatment, he was still charged with neglect of a dependent.

The facts of the *Kerlin* case even resulted in charges being brought against the administrator of the health care facility in *State v. Springer*. The *Springer* court concluded that determining whether the patients at the facility were the administrator's "dependents" is a fact question for the jury. Even though the administrator employed a medical director who was responsible for providing medical care to each of the patients at the facility, the possibility still existed that the administrator might be found guilty of neglect of a dependent if the medical director did not provide adequate care. Additionally, although other statutes are specifically directed to the protection of adults in residential health care facilities, the Neglect of a Dependent Statute can nonetheless be applied. The statute of the protection of adults in residential health care facilities, the Neglect of a Dependent Statute can nonetheless be applied.

The Kerlin and Springer courts conflict with the Fisher court in their application of the neglect statute. While the Kerlin and Springer courts were liberal in applying the

also found applicable to the administrator of this health care facility in the case of the dependent who had a chronic eye infection and infected toes. State v. Springer, 585 N.E.2d 27 (Ind. Ct. App. 1992); see infra text accompanying notes 70-73.

- 67. Kerlin, 573 N.E.2d at 450-51 (Baker, J., dissenting).
- 68. See, e.g., Davis v. State, 476 N.E.2d 127 (Ind. Ct. App. 1985); see supra notes 55-56 and accompanying text.
  - 69. Kerlin, 573 N.E.2d at 451-52.
  - 70. Springer, 585 N.E.2d at 27.
  - 71. Id. at 30.
  - 72. Id. at 31.
  - 73. Id. at 30.

statute to someone who had little contact with the victim and was acting to help the victim, the *Fisher* court refused to apply the statute to someone who knew of abuse and voluntarily provided care for the dependent, but did nothing to help. While the question of whether a victim is the defendant's "dependent" is a fact question for the jury, <sup>74</sup> this divergent application of the Neglect of a Dependent Statute demonstrates a lack of clarity in how the statute is to be applied.

## D. Is There an Injury Requirement or Limitation?

According to the statute, the defendant does not have to actually injure the dependent to be convicted, just "place[] the dependent in a situation that may endanger his life or health." This has been interpreted to mean "expose the dependent to a danger which is actual and appreciable." While most cases do involve injuries to the dependent, defendants have been convicted when no actual injuries to the dependent occurred. Bruises on a dependent's body, alone, do not constitute sufficient evidence to allow a trier of fact to infer a situation of actual and appreciable danger. If the defendant's behavior results in a serious bodily injury the offense is raised from a Class D felony to a Class B felony. The statute has been invoked not only to protect against physical injuries, but also mental injuries. The statute has also been used in situations that resulted in the dependent's death, the dependent of this use has been expressed.

- 74. Kerlin, 573 N.E.2d at 448.
- 75. IND. CODE § 35-46-1-4-(a)(1) (1993).
- 76. State v. Downey, 476 N.E.2d 121, 123 (Ind. 1985); see supra notes 24-31 and accompanying text.
- 77. See, e.g., Sample v. State, 601 N.E.2d 457 (Ind. Ct. App. 1992) (mother convicted for failure to obtain prompt medical care for her four-month-old infant after the child fell and fractured her skull even though the child's physician testified that the delay itself did not constitute an actual and appreciable threat to the child's life or health); Johnson v. State, 555 N.E.2d 1362 (Ind. Ct. App. 1990) (mother convicted when she delayed obtaining medical care for her burned seventeen-month-old infant because there was a risk of severe infection even though the delay did not actually cause any harm).
  - 78. Dayton v. State, 501 N.E.2d 482, 484 (Ind. Ct. App. 1986).
  - 79. "Serious bodily injury" is defined by IND. CODE § 35-41-1-25 (1993); see supra note 14.
  - 80. IND. CODE § 35-46-1-4(a) (1993).
  - 81. IND. CODE 35-50-2-7 (1993); see supra note 5.
  - 82. IND. CODE § 35-50-2-5 (1993) provides:

A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars (\$10,000).

Id.

- 83. See, e.g., DeMontigney v. State, 593 N.E.2d 1270, 1272 (Ind. Ct. App. 1992); Riffel v. State, 549 N.E.2d 1084, 1088 (Ind. Ct. App. 1990).
- 84. See, e.g., Lamphier v. State, 534 N.E.2d 699 (Ind. 1989); McClaskey v. State, 540 N.E.2d 41 (Ind. 1989); Strong v. State, 538 N.E.2d 924 (Ind. 1989); Hall v. State, 493 N.E.2d 433 (Ind. 1986); Bean v. State, 460 N.E.2d 936, 942-43 (Ind. 1984); Shipley v. State, 620 N.E.2d 710 (Ind. Ct. App. 1993); Mallory v. State, 563 N.E.2d 640, 643-44 (Ind. Ct. App. 1990); Gasaway v. State, 547 N.E.2d 898 (Ind. Ct. App. 1989); Hill v. State, 535 N.E.2d 153, 155-56 (Ind. Ct. App. 1989).

#### II. ABUSES

## A. The Double Jeopardy Problem

When a dependent dies as a result of neglect, the defendant is often charged with a voluntary or involuntary manslaughter, reckless homicide, or murder offense along with a charge of neglect of a dependent resulting in serious bodily injury. A double jeopardy issue arises when the defendant is convicted of both charges. The issue also arises in cases where the defendant is charged with both battery and neglect of a dependent and, in cases like State v. George, where the defendant is charged with both operating a motor vehicle while intoxicated and with neglect of a dependent because the dependent was in the car at the time. Different tests are used to determine if the two offenses in these situations are separate, punishable offenses, or if the neglect charge is a lesser included offense so that punishment for both would be double jeopardy.

Double jeopardy is barred by both the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution<sup>90</sup> and by Article 1, Section 14 of the Indiana Constitution.<sup>91</sup> The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution applies to the states through the Fourteenth Amendment.<sup>92</sup> "[T]he Fifth Amendment guarantee against double jeopardy... protects against multiple punishments for the same offense." "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." This is known as the *Blockburger* test.

"While the Indiana decisions appear to generally follow *Blockburger* it is clear that through its own constitutional provision against double jeopardy Indiana may provide its citizens more rights than those guaranteed federally." When applying the test in Indiana,

- 85. See, e.g., Lamphier, 534 N.E.2d at 701 (Shepard, C.J., concurring and dissenting) (Legislative revision of the statute defining "serious bodily injury" to omit actions that resulted in death shows legislative intent to exclude such situations from the statute. The neglect statute is not intended to cover situations in which the victim dies.); McClaskey, 540 N.E.2d at 45 (Shepard, C.J., concurring) (Situations in which the dependent dies should be treated as homicides and not as matters of neglect.).
- 86. See, e.g., Lamphier, 534 N.E.2d 699 (Ind. 1989); McClaskey, 540 N.E.2d 41 (Ind. 1989); Strong, 538 N.E.2d 924 (Ind. 1989); Hall, 493 N.E.2d 433 (Ind. 1986); Bean, 460 N.E.2d 936 (Ind. 1984); Shipley, 620 N.E.2d 710 (Ind. Ct. App. 1993); Gasaway, 547 N.E.2d 898 (Ind. Ct. App. 1989).
  - 87. Christie v. State, 536 N.E.2d 531 (Ind. Ct. App. 1989).
  - 88. See supra notes 1-5 and accompanying text.
- 89. See, e.g., State v. Kellogg, Trial No. 30D02-9207-CF00031 (Hancock County, Superior Court, Criminal Division 2, tried June 17-18, 1993); State v. Kincaid, Trial No. 06D02-9303-CF124 (Boone County, Superior Court, Criminal Division 2, tried Jan. 4, 1994).
  - 90. Smith v. State, 408 N.E.2d 614, 622 (Ind. Ct. App. 1980).
  - 91. Christie, 536 N.E.2d at 532.
  - 92. Benton v. Maryland, 395 U.S. 784, 794 (U.S. 1969).
  - 93. North Carolina v. Pearce, 395 U.S. 711, 717 (U.S. 1969).
  - 94. Blockburger v. United States, 284 U.S. 299, 304 (U.S. 1932) (citations omitted).
- 95. Hall v. State, 487 N.E.2d 181, 182 (Ind. Ct. App. 1986) (Garrard, J., dissenting from denial of petition for rehearing [citations omitted]).

the "double jeopardy analysis does not end with an evaluation and comparison of the statutory provisions. The factual bases alleged by the State in the information or indictment and upon which the charges are predicated must also be examined." If the State alleges the same facts for two separate charges, then punishment for both crimes is barred, but if the charges are not facially duplicative, then the defendant can be punished for the "two separate, independent and distinct criminal offenses."

While Indiana courts are bound by the Indiana Supreme Court's interpretation of the Double Jeopardy Clause under the Indiana Constitution, 98 the Indiana Supreme Court has not had the opportunity for such an interpretation since the latest developments from the United States Supreme Court. In addition to the *Blockburger* "same facts" test, a "same conduct" test 99 has been used, but is now disfavored. 100

In *George* and other recent cases with similar charges, Indiana case law indicates that convictions for operating a motor vehicle while intoxicated and for neglect of a dependent could not both stand. Since "both charges are based on the same acts occurring over the same time period[,]... convictions for both offenses cannot stand because one offense was the instrument by which the other was committed." "When the same act constitutes two separate crimes, the very essence of double jeopardy principles prevents two separate convictions." This argument is being made in a case similar to *George* which is currently before the Indiana Court of Appeals. 103

While this is a "same conduct" argument, the factual charges in the information or indictment would be different in a "same facts" argument. The charge of operating a vehicle while intoxicated would only have to allege that the defendant operated a vehicle with at least 0.10 percent by weight of alcohol in that defendant's blood. A neglect of a dependent charge would also have to allege the additional facts that the defendant had the legal care of a dependent and knowingly or intentionally placed that dependent in a dangerous situation. This is a good argument that the neglect charge "requires proof of additional fact[s] which the other [charge] does not." However, when interpreting the double jeopardy issue in a case with similar charges, the Indiana Supreme Court concluded that the same act had to be proven for both charges, so "no additional facts were necessary to prove the perpetration of either of these two offenses." 107

- 96. Hall, 493 N.E.2d at 435.
- 97. Christie v. State, 536 N.E.2d 531, 533 (Ind. Ct. App. 1991).
- 98. Shipley v. State, 620 N.E.2d 710, 717 (Ind. Ct. App. 1993).
- 99. Grady v. Corbin, 495 U.S. 508 (U.S. 1990); see supra text accompanying note 94.
- 100. United States v. Dixon, 113 S.Ct. 2849 (U.S. 1993).
- 101. Shipley, 620 N.E.2d at 717.
- 102. Id.
- 103. Appellant's Brief at 8-9, Kellogg v. State, No. 30A01-9310-CR-337 (Ind. Ct. App. filed Dec. 15, 1993).
  - 104. IND. CODE § 9-30-5-1 (1993).
- 105. IND. CODE § 35-46-1-4(a) (1993); see supra text accompanying notes 42-43, and 55-61; see infra text accompanying notes 114-119.
  - 106. See supra text accompanying notes 94-97.
- 107. Hall v. State, 493 N.E.2d 433, 436 (Ind. 1986) (quoting Howard v. State, 481 N.E.2d 1315, 1318 (Ind. 1985)) (neglect of a dependent charge and reckless homicide charge were both based on the parents' same

To remain consistent, the Indiana Supreme Court would also have to say that convictions of operating a vehicle while intoxicated and neglect of a dependent who was in the car at the time both "could not stand, for one is the instrumentality by which the other was committed." Under these circumstances, "the former would be a lesser included offense which would merge with the greater offense." In fact, the Indiana Supreme Court gave the example of a drunk driver who kills a pedestrian and is convicted for both driving while intoxicated and for driving while intoxicated, resulting in the death of another person as an example of two convictions that could not both stand. Similarly, convictions for driving while intoxicated, and for driving while intoxicated resulting in the endangerment of a dependent, arising out of the same act, cannot both stand.

#### B. The Intent Problem

Another area that has caused confusion in applying the Neglect of a Dependent Statute is the question of what culpability standard to apply. An objective standard is an external standard of conduct that the community demands, while a subjective standard is based on the individual judgment or perceptions of the particular actor. The Neglect of a Dependent Statute says that the behavior must be done "knowingly or intentionally." A person engages in conduct intentionally if, when he engages in the conduct, it is his conscious objective to do so." A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." When a statute specifies a particular kind of culpability, it is required as to all material elements of the offense, unless the statute specifies otherwise. 117

The correct interpretation of this culpability statute is that it mandates a subjective intent standard. "[T]he accused must have been subjectively aware of a high probability that he placed the dependent in a dangerous situation." While seemingly a clear interpretation of the culpability statute, not all courts have followed it when applying the Neglect of a Dependent Statute.

act of failure to provide medical treatment for their son).

- 108. Id.
- 109. Id.
- 110. IND. CODE ANN. § 9-11-2-2 (Burns Supp. 1985).
- 111. IND. CODE ANN. § 9-11-2-5 (Burns Supp. 1985).
- 112. Hall, 493 N.E.2d at 436.
- 113. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 173-74 (5th ed. 1984); Ware v. State, 441 N.E.2d 20, 21 (Ind. Ct. App. 1982).
  - 114. IND. CODE § 35-46-1-4(a) (1993).
  - 115. IND. CODE § 35-41-2-2(a) (1993).
  - 116. IND. CODE § 35-41-2-2(b) (1993).
- 117. See, e.g., IND. CODE § 35-41-2-2(d) (1993); Williford v. State, 577 N.E.2d 963 (Ind. 1991) (DeBruler, J., dissenting to denial of transfer).
  - 118. Armour v. State, 479 N.E.2d 1294, 1297 (Ind. 1985).
  - 119. Id.

The problems started with a 1980 case, *Smith v. State*, <sup>120</sup> in which the appellant claimed that the State had failed to prove the requisite intent element. While discussing the intent requirement under the current Neglect of a Dependent Statute, the *Smith* court quoted a 1977 decision, *Hunter v. State*, <sup>121</sup> which upheld the conviction of the appellants under an old statute prohibiting cruelty and neglect of children. <sup>122</sup> That statute was repealed by the 1976 enactment of the current chapter on Offenses Against the Family, <sup>123</sup> which took effect July 1, 1977. <sup>124</sup> The *Hunter* opinion, in turn, concluded that the intent requirement of the old cruelty and neglect of children statute had, in effect, been removed by a 1967 Indiana Supreme Court decision, *Eaglen v. State*, <sup>125</sup> which found the defendant guilty under the child neglect statutes. <sup>126</sup> The *Eaglen* court decided that "neglect" was to be defined using an objective, "reasonable parent" standard and that even if the defendant "had no actual knowledge that his child was extremely ill, since he could easily have become aware of that fact had he exercised his statutory duty," then the lack of actual knowledge provided the defendant with no defense. <sup>127</sup>

The old neglect of child statute said:

Neglect of a child shall consist in any of the following acts, by anyone having the custody or control of the child;

(a) wilfully failing to provide proper and sufficient food, clothing, maintenance, regular school education as required by law, medical attendance or surgical treatment, and a clean and proper home, or (b) failure to do or permit to be done any act necessary for the child's physical or moral well-being . . . . . 128

When the defendant claimed he did not know or could not tell that his child was sick, the Court responded by citing a 1914 English case, *Oakey v. Jackson*, <sup>129</sup> that construed a similar English statute. That English statute said:

If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person, wilfully . . . neglects . . . such child or young

- 120. 408 N.E.2d 614 (Ind. Ct. App. 1980), overruled by Armour v. State, 479 N.E.2d 1294 (Ind. 1985).
- 121. 360 N.E.2d 588 (Ind. App. 1977).
- 122. Id. at 605; IND. CODE ANN. § 35-14-1-4 (Burns 1971).
- 123. IND. CODE § 35-46-1 (1988 & Supp. 1992).
- 124. Act of Feb. 25, 1976, Pub. L. No. 148, 1976 Ind. Acts 718 (codified as amended at Ind. Code § 35-46-1 (1993)).
  - 125. 231 N.E.2d 147 (Ind. 1967); Hunter, 360 N.E.2d at 604.
- 126. Eaglen, 231 N.E.2d at 151. See IND. CODE ANN. §§ 10-813 to 10-815 (Burns 1956) (This section was carried forward into the new Indiana Code of 1971 as §§ 35-14-1-2 to 4. Section 10-815, the penalty section of the cruelty and neglect of children statutes, became § 35-14-1-4. Cruelty and neglect of child is defined in § 10-813 which was carried forward as § 35-14-1-2. So the Eaglen and Hunter courts were using the same statutes which were in different versions of the Code. The only changes made to the statutes between these two cases was in the penalty provisions. But the current Neglect of a Dependent Statute is a completely different statute.).
  - 127. Eaglen, 231 N.E.2d at 150.
  - 128. IND. CODE ANN. § 10-813 (Burns 1956).
  - 129. [1914] 1 K.B. 216 (Eng.).

person, or causes or procures such child or young person to be . . . neglected . . . in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanor, . . . and for the purposes of this section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid, or lodging for the child or young person, or if, being unable otherwise to provide such food, clothing, medical aid, or lodging, he fails to take steps to procure the same to be provided under the Acts relating to the relief of the poor. 130

But the question before the English judges was not whether the parent had the requisite state of mind to "wilfully" neglect the child. The question was whether the refusal to allow an operation constituted a failure to provide adequate medical care. The court concluded that this was a question of fact to be decided at the trial level. To give the trial court guidance, the court quoted the common law definition of "wilful neglect." The Smith court and the Eaglen court both quoted part of the Oakey court's definition of "neglect," which is "the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind." This is an objective standard which is to be used to determine if the parent had a duty to act.

However, this definition is not to be used to determine the culpability standard necessary for a conviction under the statute. Its sole use is to determine whether the parent had a duty to act. If no duty exists, then there can be no conviction, regardless of what action the parent takes. If it is determined that a duty does exist, using this objective standard, then the parent can only be found guilty if the trier finds that the parent "wilfully" neglected to take action.<sup>134</sup>

Both the Eaglen and the Smith courts failed to utilize the English court's definition of "wilfully." The Oakey court defined "willfully" to mean "that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person goes with it." This is a subjective standard that is to be applied to the mental element of the crime. Additionally, the rest of the court's definition of "neglect," which both the Eaglen and the Smith courts failed to quote is: "that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps." This further contemplates the idea of a conscious, subjective choice on the part of the parent. In determining the objective standard to which a person must subjectively

<sup>130.</sup> The Children Act, 1908, 8 Edw. 7, c. 67, § 12, (Eng.).

<sup>131.</sup> Oakey, [1914] 1 K.B. at 220.

<sup>132.</sup> Id.

<sup>133.</sup> Id. at 219.

<sup>134.</sup> See IND. CODE ANN. § 10-813 (Burns 1956).

<sup>135.</sup> Oakey, [1914] 1 K.B. at 219.

<sup>136.</sup> Id. at 219-20.

choose to adhere to avoid conviction under this statute, it must be a choice that is available for the reasonable parent to make.

The Eaglen court concluded that even assuming the parent did not know the child was ill, "since he could easily have become aware of that fact had he exercised his statutory duty, such a contention provide[d] appellant no defense." The court reasoned that it had a duty to "enforce the minimum standards of parental knowledge and conduct clearly and definitely delineated by our child-neglect statutes." This is an objective standard that the Indiana Supreme Court decided should be used in construing the old neglect of child statute. The Hunter court summarized the Eaglen court's decision regarding the intent element by saying that it "in effect removes the requirement of intent." This reinforces the use of an objective standard in construing the old statute.

The end result is that in construing the culpability standard required to convict a defendant under Indiana's new Neglect of a Dependent Statute, the *Smith* court erroneously relied on a 1914 English court's interpretation of the standard to be used to determine whether a person has a duty to seek care for a child under a 1908 English statute that was very similar to Indiana's old neglect of child statute, which was repealed, effective July 1, 1977. Indiana courts have interpreted this 1914 English opinion as meaning that when deciding whether a person has wilfully neglected a child, they are to do so using an objective standard. The courts reached this conclusion without mentioning the English court's definition of "wilfully." The *Smith* court incorporated these cases into its decision construing the new Neglect of a Dependent Statute without mentioning the statute that defines culpability terms, It which was enacted in 1976 as part of the same Act that also included the new Neglect of a Dependent Statute. Additionally, the old neglect of child statute and the English Children Act both used the word "wilfully," while the new Neglect of a Dependent Statute uses the terms "knowingly or intentionally."

As the *Smith* court correctly stated, the situation is different when the "offense grows out of the nonperformance of an affirmative duty imposed by law for the care and protection of a [dependent]." When the defendant does a positive act that violates the statute, the State must then prove: (1) the defendant knowingly or intentionally, (2) did the act that violates the statute, and (3) that the defendant had the care of the dependent, whether assumed voluntarily or because of a legal obligation. But when the offense rises out of inaction, the *Smith* court was nearly accurate, despite the misleading discussion that led to its conclusion that "the words 'knowingly' or 'intentionally' require the State only to prove that the defendant parent was aware of facts that would alert a reasonable parent under the circumstances to take affirmative action to protect the child." While citing the *Eaglen* case, which held that knowledge was not necessary for

<sup>137.</sup> Eaglen, 231 N.E.2d at 150.

<sup>138.</sup> Id.

<sup>139.</sup> Hunter, 360 N.E.2d at 604.

<sup>140.</sup> IND. CODE ANN. § 35-14-1-2 (Burns 1973 & Supp. 1976).

<sup>141.</sup> IND. CODE § 35-41-2-2 (1993).

<sup>142.</sup> Smith v. State, 408 N.E.2d 614, 621 (Ind. Ct. App. 1980).

<sup>143.</sup> See, e.g., Ind. Code § 35-46-1-4(a) (1993); Indiana Judges Ass'n, Indiana Pattern Jury Instructions: Criminal, Instruction No. 7.09 (2d ed. 1991).

<sup>144.</sup> Smith, 408 N.E.2d at 621.

a conviction, the *Smith* court concluded that use of the words "knowingly and intentionally" in the new statute did require knowledge on the part of the defendant for a conviction.

This is a modification of the objective standard because it does require the defendant's awareness of the facts. A "pure" objective standard would only require that the defendant be in a situation that a "reasonable" person would realize required affirmative action to protect their dependent. By requiring an awareness of the facts, the *Smith* court's interpretation would excuse a defendant who did not perceive the surrounding circumstances, either due to a lack of ability to perceive or due to a lack of attentiveness. But this is insufficient for the subjective standard required by the statute.

A jury may infer that a person intends the natural and probable consequences of his voluntary acts. <sup>145</sup> Knowledge or intent is a mental function and, absent an admission, can be inferred from an examination of the facts and circumstances. <sup>146</sup> Therefore, the *Smith* court's interpretation would be an accurate statement of the law if the State also proved that the defendant was, in fact, a reasonable parent. The culpability statute requires, at a minimum, that upon acting, the accused was "aware of a high probability that he [was] doing so." <sup>147</sup> If the State only proved that the accused "was aware of facts that would alert a reasonable parent under the circumstances to take affirmative action to protect the child," <sup>148</sup> then the possibility exists that the accused was not a reasonable parent. The accused might have been aware of the facts without realizing that such facts constituted a duty to take affirmative action. Failure to take affirmative action under such circumstances would not violate the statute as it would not be a "knowing" decision.

The Smith court further defends its position by reasoning

that there is little essential difference in the expressed purpose of child protection between [the old] and the present statutes.... The affirmative duty of a parent to care for and protect his child, the rationale therefore, and the standard of care imposed thereby as expressed in *Eaglen* and *Hunter*, are equally applicable to the present statutes.<sup>149</sup>

While true, this ignores the changes in the statute, most importantly, the change from "wilfully" to "knowingly and intentionally" and the enactment of the statutory definitions of those terms.

One court defended the *Smith* court's decision by expressing the belief that the decision to use an objective standard was really an attempt to define the actus reus of the statute instead of the mens rea.<sup>150</sup> An objective standard should be used to determine if

<sup>145.</sup> See, e.g., Sandstrom v. Montana, 442 U.S. 510 (1979) (explaining that this cannot relieve the State of its burden of proof on an essential element of a charged crime; it can merely create a permissive inference, not a mandatory presumption); Blackburn v. State, 519 N.E.2d 554, 556-57 (Ind. 1988).

<sup>146.</sup> See, e.g., Mitchell v. State, 557 N.E.2d 660, 664-65 (Ind. 1990); Stout v. State, 528 N.E.2d 476, 482 (Ind. 1988); Gibson v. State, 515 N.E.2d 492, 496 (Ind. 1987); Perkins v. State, 392 N.E.2d 490, 495 (Ind. App. 1979).

<sup>147.</sup> IND. CODE § 35-41-2-2(b) (1993).

<sup>148.</sup> Smith, 408 N.E.2d at 621.

<sup>149.</sup> Id

<sup>150.</sup> McMichael v. State, 471 N.E.2d 726, 731-32 (Ind. Ct. App. 1985).

an affirmative duty to take action for the care and protection of the dependent is imposed by the law. If a subjective standard were used, a person with a very high standard who did not act according to that standard could be convicted even when the dependent was not really in a dangerous situation at all. At the same time, a person with a very low standard could not be convicted when knowingly placing their dependent in a very dangerous situation because the situation did not require action according to their low standard.<sup>151</sup> Indiana appellate courts do, in fact, apply an objective standard when faced with the issue of whether there was a duty to act.<sup>152</sup> But the statutes require a subjective intent element for a conviction, which is at odds with the *Smith* court's statement of what the State must prove for a conviction.<sup>153</sup>

Similarly, an objective standard should also be used to determine if a confinement is "cruel"<sup>154</sup> under subsection (2)<sup>155</sup> of the statute and what constitutes "necessary"<sup>156</sup> support under subsection (3).<sup>157</sup>

In 1982, another Indiana appellate court was faced with the issue of whether the proper interpretation of the word "knowingly" in the Neglect of a Dependent Statute meant an objective standard or a subjective standard in Ware v. State. 158 The Ware court cited a 1908 Indiana Supreme Court decision<sup>159</sup> that was decided prior to the passage of the new neglect and culpability statutes in which the court stated that "the term 'knowingly' in a criminal proceeding imports that the accused person knew what he was about, and, possessing such knowledge, proceeded to commit the crime of which he is charged."160 This is a subjective standard, but since the Indiana Supreme Court had not yet interpreted this term under the new statutes, the Ware court had to decide whether to use the objective intent standard the Indiana Supreme Court had applied to the old neglect of child statute or use the subjective standard previously used by the courts in conjunction with the term "knowingly" and mandated by the new culpability statute. This new culpability statute was the "first attempt in Indiana to codify the degrees of mens rea, or mental intent, required for the commission of crime."161 The Ware court acknowledged that the Smith court had determined that the statute was to be interpreted using an objective standard, but also realized that the Smith court had failed to consider the new

<sup>151.</sup> See Hartbarger v. State, 555 N.E.2d 485 (Ind. Ct. App. 1990); see infra text accompanying notes 237-39.

<sup>152.</sup> See supra notes 133-34 and accompanying text; see infra notes 185-86, 191, and 194 and accompanying text; cf. Hartbarger, 555 N.E.2d at 487 (applying an objective standard to determine if a confinement was "cruel" under IND. CODE § 35-46-1-4(a)(2)); cf. Ricketts v. State, 598 N.E.2d 597, 600-01 (Ind. Ct. App. 1992) (applying an objective standard to determine if support was "necessary" under IND. CODE § 35-46-1-4(a)(3)).

<sup>153.</sup> See supra text accompanying note 144.

<sup>154.</sup> Hartbarger, 555 N.E.2d at 487; see supra text accompanying notes 15-16.

<sup>155.</sup> IND. CODE § 35-46-1-4(a)(2) (1993).

<sup>156.</sup> Ricketts, 598 N.E.2d at 600; see supra text accompanying notes 17-23.

<sup>157.</sup> IND. CODE § 35-46-1-4-(a)(3) (1993).

<sup>158.</sup> Ware v. State, 441 N.E.2d 20, 21 (Ind. Ct. App. 1982).

<sup>159.</sup> Id. at 22.

<sup>160.</sup> State v. Bridgewater, 85 N.E. 715, 718 (Ind. 1908).

<sup>161.</sup> IND. CODE ANN. § 35-41-2-2 (West 1978) (Commentary, by Charles A. Thompson).

culpability statute. Using principles of statutory construction, the *Ware* court analyzed the statutes anew.<sup>162</sup>

"In reviewing a statute, [the court's] foremost objective is to determine and effect legislative intent." It is the duty of the court to construe statutes passed at the same session of the legislature in such manner as to give effect and efficiency to both statutes ...." A comparison of the language of the present Act with that of its forerunner is also instructive." A change in wording from that of the former act strongly indicates legislative intent to change the pre-existing law. Where, in an act it is declared that a term shall receive a certain construction, the courts are bound by that construction, though otherwise the language would be held to mean a different thing."

Applying these principles, the court represented legislative intent by finding that:

[t]he culpability definition statute and the child neglect statute were passed during the same legislative session. The effect of the former—which defines "knowingly" in subjective terms—is to impose upon Indiana courts a consistent and uniform system for defining the mens rea of the crimes enumerated in the Indiana Code. The principal difference between the previous child neglect statute and the current version is the inclusion in the new statute of two possible degrees of mental intent—"knowingly" or "intentionally." Thus, we can conclude that the legislature, by inserting degrees of mental intent in the child neglect statute and succinctly defining those degrees in the culpability definition statute, intended to effect a change in the former statute and thereby bind the courts. In order to be convicted of knowingly neglecting a dependent under IC 35-46-1-4(a)(1), the accused must have been subjectively aware of a high probability that he placed the dependent in a dangerous situation. conclusion promotes uniformity, the obvious goal of the culpability definition statute, without defeating the goal of the child neglect statute, to-wit, protection of children. Requiring proof of subjective knowledge in applying subsection (a)(1) of the child neglect statute is hardly inconsistent with the legislative objective. 168

But this same court, when confronted with the issue again in the 1985 case of *Davis* v. *State*, demonstrated the confusion in this area by quoting the *Smith* court when it stated that the Neglect of a Dependent Statute

requires the endangerment or abandonment to have been either knowing or intentional. Although a parent need not possess a specific intent to commit neglect, he or she must at a minimum be 'aware of facts that would alert a

<sup>162.</sup> Ware, 441 N.E.2d at 22.

<sup>163.</sup> Spaulding v. International Bakers Servs., Inc., 550 N.E.2d 307, 309 (Ind. 1990).

<sup>164.</sup> Olszewski v. Stodola, 82 N.E.2d 256, 257 (Ind. 1948).

<sup>165.</sup> Wallis v. Marshall County Comm'rs, 546 N.E.2d 843, 844 (Ind. 1989).

<sup>166.</sup> See, e.g., id.; Gingerich v. State, 93 N.E.2d 180, 182 (Ind. 1950).

<sup>167.</sup> Spaulding, 550 N.E.2d at 309 (quoting Department of State Revenue v. Crown Dev. Co., 109 N.E.2d 426, 428-29 n.1 (Ind. 1952)).

<sup>168.</sup> Ware, 441 N.E.2d at 23.

reasonable parent under the circumstances to take affirmative action to protect the child.'169

The *Davis* court then concluded that a father's conviction could not stand even if he knew that his hours-old newborn was going to be left at the side of a gravel road by the mother because he was not present at the birth or the abandonment. Requiring the parent to be present at the time of an abusive act for a conviction is at odds with other cases in which a parent was found guilty of neglect of a dependent upon leaving their child alone with someone they knew was abusive to their child and that person did in fact injure the child.<sup>170</sup> Under the statutory standard, the father in *Davis* should have been found guilty of neglect of a dependent if he knew his child was going to be abandoned and did nothing to dissuade or stop the mother. The court's conclusion could only be supported if evidence showed that the father did not know the baby was going to be abandoned, not just by showing his absence.

Another appellate court, in *McMichael v. State*, addressed the issue in 1984 and agreed that the subjective standard was mandated by the culpability statute<sup>171</sup> before the Indiana Supreme Court finally addressed the issue in 1985<sup>172</sup> and held that the *Ware* and *McMichael* appellate courts

correctly apply the subjective standard mandated by our culpability definiting [sic] statute. We now hold that the level of culpability required when a child neglect statute requires knowing behavior is that level where the accused must have been subjectively aware of a high probability that he placed the dependent in a dangerous situation.<sup>173</sup>

The Indiana Supreme Court in another case explained in dictum that "it is not necessary to show that the defendant purposely inflicted . . . injury."<sup>174</sup> It is enough to show that the defendant placed the dependent in a situation the defendant knew was dangerous.<sup>175</sup> But this did not end the confusion on the culpability issue.

In 1990, the appellate court, which had first applied the objective standard to the new Neglect of a Dependent Statute in *Smith*, followed the Indiana Supreme Court's mandate and applied a subjective intent standard.<sup>176</sup> But later that year, in *Hastings v. State*, the same appellate court accurately began its analysis by stating that "[i]n order to obtain a conviction for neglect of a dependent, the State must show that the accused was subjectively aware of a high probability that the accused placed the dependent in a dangerous situation." However, in the next sentence, the court quoted its *Smith* 

<sup>169.</sup> Davis v. State, 476 N.E.2d 127, 140 (Ind. Ct. App. 1985).

<sup>170.</sup> See, e.g., Hastings v. State, 560 N.E.2d 664 (Ind. Ct. App. 1990); Wilson v. State, 525 N.E.2d 619 (Ind. Ct. App. 1988).

<sup>171. 471</sup> N.E.2d 726 (Ind. Ct. App. 1984).

<sup>172.</sup> Armour v. State, 479 N.E.2d 1294 (Ind. 1985).

<sup>173.</sup> Id. at 1297 (citation omitted).

<sup>174.</sup> Howard v. State, 481 N.E.2d 1315, 1317 (Ind. 1985).

<sup>175.</sup> Id

<sup>176.</sup> Fisher v. State, 548 N.E.2d 1177 (Ind. Ct. App. 1990); see supra note 133 and accompanying text.

<sup>177.</sup> Hastings v. State, 560 N.E.2d 664, 666-67 (Ind. Ct. App. 1990).

decision, saying that "[t]o make such a showing the State need only prove that the accused was aware of facts which would alert a reasonable parent under the circumstances to take affirmative action to protect the child." The Indiana Supreme Court rejected this holding; it is a misstatement of the law. 179

The *Hastings* court further held that a mother's prior guilty plea to a neglect of a dependent charge stemming from an incident in which her boyfriend physically abused her child was admissible to show that the mother had the requisite knowledge to hold her culpable for leaving the child with her boyfriend, thereby knowingly placing the child in a dangerous situation.<sup>180</sup> The mother's conviction was reversed, however, because the trial court admitted statements by the mother to a welfare worker that she suspected her boyfriend had previously abused her child. These statements constituted an involuntary confession.<sup>181</sup> Thus its admission into evidence was fundamental error that required a reversal of the conviction.<sup>182</sup> Although the *Hastings* court misstated the law with respect to the intent element at the beginning of the opinion,<sup>183</sup> its analysis and conclusion correctly followed the use of a subjective intent standard.<sup>184</sup>

Two months later, in *Mallory v. State*, the same court again cited its *Smith* opinion, but this time as standing for the proposition that the objective standard is used to determine the standard of care a parent owes to his or her child<sup>185</sup>—a correct statement of the law.<sup>186</sup> The court also stated that "[a] parent is charged with an affirmative duty to care for her child."<sup>187</sup> In *Mallory*, the jury was permitted to infer from circumstantial evidence that a parent knew the child needed medical care and could therefore conclude that the parent's conduct constituted knowing neglect under the statute.<sup>188</sup>

In 1992, this court, in Sample v. State, again correctly applied the subjective intent standard to show the defendant's knowledge. The court stated that a subjective test should be applied to the knowledge element of the neglect of a dependent offense. But the court then quoted a 1989 Indiana Supreme Court decision, which, in turn, quoted the Eaglen decision, to establish that an objective standard is used to define "neglect." The Sample court concluded that circumstantial evidence from the doctor's description of the injury and opinion as to its probable appearance to the baby's caretaker, the testimony of the child's babysitter as to the child's behavior and appearance, and the defendant's own

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178. Id. at 667.
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<sup>179.</sup> Armour, 479 N.E.2d at 1297; see supra notes 172-73.

<sup>180.</sup> Hastings, 560 N.E.2d at 670.

<sup>181.</sup> Id. at 669.

<sup>182.</sup> Id. at 670.

<sup>183.</sup> See supra text accompanying notes 177-79.

<sup>184.</sup> Hastings, 560 N.E.2d at 670-71.

<sup>185.</sup> Mallory v. State, 563 N.E.2d 640, 644 (Ind. Ct. App. 1990).

<sup>186.</sup> See supra text accompanying notes 133-34; see infra text accompanying notes 191 and 194.

<sup>187.</sup> Mallory, 563 N.E.2d at 644. The Smith case was also cited as standing for this proposition by WAYNE R. LAFAVE AND AUSTIN W. SCOTT, CRIMINAL LAW § 3.3(a)(1) at 203-04 (2d ed. 1986).

<sup>188.</sup> *Id*.

<sup>189.</sup> Sample v. State, 601 N.E.2d 457 (Ind. Ct. App. 1992).

<sup>190.</sup> Id. at 458-59.

<sup>191.</sup> Id. at 459.

testimony was sufficient "to permit the jury to infer that [the defendant] was aware of a high probability that by failing to obtain medical treatment for her daughter, she was placing the child in a situation which endangered her life and health." This statement suggests an objective standard—the baby's injury was such that it was obvious to a reasonable person that the baby needed medical attention. But the defendant's testimony, combined with permissible inferences from the circumstantial evidence constituted sufficient evidence of her actual knowledge that the child needed medical treatment<sup>193</sup> to satisfy the statutory knowledge requirement. The line between an objective standard and a subjective standard that is inferred from circumstantial evidence is a very fine one.

In *Rinker v. State*, the second district correctly used a subjective knowledge standard and an objective standard of neglect in terms of adequate nutrition and reasonably clean living conditions in upholding the conviction of a parent whose conduct was not as egregious as that in most neglect of a dependent cases. While filthy living conditions and evidence of malnutrition were sufficient to support a conviction in *Rinker*, the same court, a year later, held that "evidence of malnutrition, in and of itself, does not support the conclusion that the person's health or life is at risk or in danger," and was therefore insufficient to sustain a neglect of a dependent conviction. 196

In Fout v. State, the third district also correctly applied the subjective standard, noting<sup>197</sup> that "[n]ormally a defendant's subjective awareness requires resort to inferential reasoning to ascertain a mental state. Thus, a court must view all the surrounding circumstances to determine whether the guilty verdict was proper." This is the same method the Sample court used. In Fout, as in Sample, circumstantial evidence was used to infer the knowledge requirement as well as evidence from the defendant's own admissions. 199

In Fout, the defendant was found guilty for failing to seek medical aid during the last stages of his wife's troubled pregnancy when the couple had been advised to proceed immediately to the hospital because the mother and the baby were at a very high risk of injury or death. The mother's water had broken five weeks before her due date. An examination had revealed the inherent dangers of a premature birth, that an infection was present, and that the fetus was in a breech position. However, the couple insisted on a home delivery. In fact, the baby was born prematurely at home, would not eat, experienced breathing difficulties, and died the next day. The couple never sought medical assistance. The defendant was convicted of an elevated Class B felony for neglect of a dependent that resulted in serious bodily injury even though the child would have had only a fifty percent chance of survival had immediate medical aid been administered. The fact that the baby did not survive and was not given any medical treatment, coupled with the evidence that the defendant refused medical treatment while

<sup>192.</sup> Id. at 460.

<sup>193.</sup> Id. at 459-60.

<sup>194. 565</sup> N.E.2d 344, 346 (Ind. Ct. App. 1991).

<sup>195.</sup> Id.

<sup>196.</sup> Ricketts v. State, 598 N.E.2d 597, 597 (Ind. Ct. App. 1992).

<sup>197.</sup> Fout v. State, 575 N.E.2d 340, 342 (Ind. Ct. App. 1991).

<sup>198.</sup> Id.

<sup>199.</sup> *Id*.

aware of the risks, was sufficient to support the conviction and enhancement to a Class B felony.<sup>200</sup>

In a companion case, the wife's conviction was reversed because of the "quite different records developed in the two cases." The evidence showed that the defendant-wife was aware, before the birth, that her pregnancy was high risk because the baby was in the breech position and because her water had broken prematurely. The defendant did not comply with her doctor's instructions to go to the hospital after her water broke. The evidence that showed that she was aware of the infection, however, was excluded because of the physician-patient privilege. Although the baby exhibited some signs of health problems in the twenty-four hours she was alive, none of the evidence showed that the mother knew these signs indicated that the baby had a serious problem. The evidence also showed that the baby died of the infection and had the mother obtained proper care for the baby, the baby would have had a substantial chance of surviving. The court concluded that

the evidence of the element that is missing in this case, the knowledge of the danger to which she was exposing her child, was present in her husband's case. The absence of this evidence here distinguishes [the wife's] conviction from that of her husband, and the absence of this evidence is the reason why her conviction may not stand while her husband's may.<sup>204</sup>

The court reversed the wife's conviction because it was not supported by sufficient evidence.<sup>205</sup>

The *Fout* court required a high standard of evidence necessary for a showing of knowledge to sustain a conviction in a case that seemed to have sufficient circumstantial evidence from which the jury could infer the necessary knowledge element. While the mother realized that the baby was in danger and that she should seek further medical assistance, the evidence did not show knowledge of the infection, the danger that actually caused the baby's death. This court required not only knowledge of a dangerous situation and inaction by the parent when help was readily obtainable; it also required evidence of knowledge of the danger that actually caused harm to the defendant, a standard higher than that required by the statute.

In a contrasting case, White v. State, the Indiana Supreme Court quoted the objective standard from Eaglen in deciding whether an environment of illegal drug use "poses an actual and appreciable danger to a dependent." This is a case where the defendant's positive actions created the environment. The court found that the Eaglen court's objective standard, which had previously been applied to omissions, was the appropriate way to determine whether this environment of drug use created the requisite "actual and

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200. Id.
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<sup>201.</sup> Fout v. State, 619 N.E.2d 311, 314 (Ind. Ct. App. 1993).

<sup>202.</sup> Id. at 313.

<sup>203.</sup> Id.

<sup>204.</sup> Id. at 314.

<sup>205.</sup> Id.

<sup>206.</sup> See supra text accompanying notes 145-46.

<sup>207.</sup> White v. State, 547 N.E.2d 831 (Ind. 1989).

appreciable danger" to the child—a violation of the statute.<sup>208</sup> The court determined that drug use did create such a danger and, since the defendant knowingly subjected the dependent to that environment, the conviction was upheld.<sup>209</sup>

The "knowing act" required in White was subjecting the dependent to an environment of illegal drug use, not knowingly subjecting the dependent to this environment knowing that the drugs were a danger to the dependent. Compared to Fout, the conviction resulted from a liberal application of the statute and interpretation of what constitutes an environment that poses an actual and appreciable danger. The child had observed both of her parents smoke marijuana repeatedly. On various occasions, the dependent had found marijuana and intravenous drug paraphanalia around the home where they lived. The dependent had also "observed her father at home on one or two occasions mash up a white powder and inject it into his arm."210 The child was told it was "speed," but evidence was insufficient to show that the substance being injected was a narcotic drug or even a controlled stimulant.<sup>211</sup> In fact, no evidence was presented at trial that showed that the drugs presented a danger to the child except when an expert witness testified that "a child's exposure to an environment of illegal drug use constitutes an actual and appreciable danger by causing the drug-using parent to neglect that child's well-being."<sup>212</sup> But "[t]here was no evidence that either parent failed to provide the daughter with food, clothing, or shelter, or mistreated her in any way."213 The court concluded that since drugs are illegal because of their harmful effects and consequences, the defendant's knowing exposure of his dependent to them was per se an actual and appreciable danger.214

The defendant was convicted on a second count of neglect of a dependent in *White* for providing the child with marijuana and smoking it with her.<sup>215</sup> However, the State presented no evidence that smoking marijuana is addictive or harmful to the health. The dissenting justice thought that there was not enough evidence that "the experimentation by the daughter on two or three occasions was such as to create an actual and appreciable danger to the child's life or health as is essential [for conviction]."<sup>216</sup>

The court split three to two in upholding the conviction for the first count and four to one on the second count. This demonstrates a very liberal application of the Neglect of a Dependent Statute to a situation where no evidence was proffered that the dependent was ever in any danger. Ironically, a stronger case could perceivably be made that smoking cigarettes in a dependent's presence constitutes a situation of an actual and appreciable danger to the life or health of that dependent.<sup>217</sup> This points out the vagueness

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208. Id. at 836.
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<sup>209.</sup> Id.

<sup>210.</sup> Id. at 833.

<sup>211.</sup> Id. at 838 (DeBruler, J., dissenting).

<sup>212.</sup> *Id*.

<sup>213.</sup> Id. at 838 (DeBruler, J., dissenting).

<sup>214.</sup> Id. at 836.

<sup>215.</sup> Id.

<sup>216.</sup> Id. at 838 (DeBruler, J., dissenting).

<sup>217.</sup> See Smoke Hurting Children, THE NEWS-SENTINEL (Fort Wayne), Jan. 6, 1994, at 1H (Surgeon General Joycelyn Elders opens a new campaign against secondhand smoke because of the harmful effects on

of the statute and the discretion that prosecutors have under such a statute in choosing when to apply it and to whom.

## C. The Unconstitutionally Vague and Overbroad Problem

Another issue that has been litigated several times in connection with the Neglect of a Dependent Statute is the statute's constitutionality. Indiana's neglect statutes have a history of constitutional attacks. Indiana's Neglect of a Dependent Statute has been attacked as being both unconstitutionally vague and overbroad. While several appellate courts have upheld the statute under such attacks, the Indiana Supreme Court has not done so very convincingly. To save the statute from being overbroad and vague, the Indiana Supreme Court narrowed its construction to apply only to situations that endanger the dependent's life or health with an actual and appreciable danger. However, the court stated that "[e]ven with this construction, there is a residual vagueness presented." This suggests that the statute may still be open to further attacks and, indeed, it has been attacked several times since this opinion. 221

When considering a constitutionality attack, "[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."<sup>222</sup> The statute is judged on an "as-applied" basis.<sup>223</sup>

The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."<sup>224</sup>

"Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." This is clearly an objective test.

The Indiana Supreme Court has stated that when addressing the constitutionality of a statute, a court must exercise self-restraint or be in danger of exceeding its own constitutional bounds when limiting the legislature to theirs. A court must act as a court,

children).

<sup>218.</sup> See generally Dirk William De Roos, Note, Dependency and Neglect: Indiana's Definitional Confusion, 45 IND. L.J. 606 (1970).

<sup>219.</sup> See, e.g., State v. Downey, 476 N.E.2d 121 (Ind. 1985); Demontigney v. State, 593 N.E.2d 1270 (Ind. Ct. App. 1992); Klagiss v. State, 585 N.E.2d 674 (Ind. Ct. App. 1992); Kerlin v. State, 573 N.E.2d 445 (Ind. Ct. App. 1991); Mallory v. State, 563 N.E.2d 640 (Ind. Ct. App. 1990).

<sup>220.</sup> Downey, 476 N.E.2d at 123.

<sup>221.</sup> See, e.g., Mallory, 563 N.E.2d at 640; Kerlin, 573 N.E.2d at 447; Demontigney, 593 N.E.2d at 1270; Klagiss, 585 N.E.2d at 674.

<sup>222.</sup> United States v. Mazurie, 419 U.S. 544, 550 (1975).

<sup>223.</sup> Maynard v. Cartwright, 486 U.S. 356, 361 (1988).

<sup>224.</sup> Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982) (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)).

<sup>225.</sup> Maynard, 486 U.S. at 361.

not as a "supreme legislature." The legislature is afforded a wide latitude of discretion in its job of determining public policy. The court has the constitutional power to limit the legislature to its lawful territory by "prohibiting legislation which, although enacted under the claim of a valid exercise of police power, is unreasonable and oppressive." A court can also narrow the construction of a statute to save it from nullification if such a narrowing construction "does not establish a new or different policy basis and is consistent with legislative intent." But "[a] court cannot amend a statute or establish public policy." The authority to define crimes and establish penalties belongs to the legislature."

A statute is presumed constitutional until that presumption is overcome by a clear showing to the contrary.<sup>231</sup> "A statute will not be found unconstitutionally vague if individuals of ordinary intelligence would comprehend it to adequately inform them of the conduct to be proscribed."<sup>232</sup> A statute does not have to list each item of conduct that is prohibited, it only has to inform the individual of the "generally proscribed conduct."<sup>233</sup> By these standards, the Neglect of a Dependent Statute passes the test, especially since it begins with a presumption of constitutionality. By this objective test, a reasonable person would know that the responsibility of caring for a dependent includes a duty to protect and not endanger the life or health of the dependent. The law needs to enforce this duty because a dependent is not capable of self-protection.

But the Indiana Supreme Court has also stated that a statute must be written so that persons of common intelligence are not left to guess about its meaning nor differ as to its application.<sup>234</sup> "[T]here must be something in a criminal statute to indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur. It cannot be left to juries, judges, and prosecutors to draw such lines."<sup>235</sup> The cases are full of examples of conflicting uses and opinions.<sup>236</sup> Since the Neglect of a Dependent Statute is so broadly written, prosecutors have a tool with which they can exercise a large amount of discretion both in whom they charge and under what circumstances.

An example of the exercise of prosecutorial discretion leading to a liberal application of the Neglect of a Dependent Statute can be found in a 1990 case where "cruel confinement" charges were brought against a boy's parents when they punished him by

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226. Downey, 476 N.E.2d at 122.
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<sup>227.</sup> Id.

<sup>228.</sup> Id. at 123.

<sup>229.</sup> Id.

<sup>230.</sup> Id.

<sup>231.</sup> Id. at 122.

<sup>232.</sup> Id.

<sup>233.</sup> Id.

<sup>234.</sup> Id. at 123 (citing Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

<sup>235.</sup> Id. (quoting Stone v. State, 41 N.E.2d 609 (Ind. 1942)).

<sup>236.</sup> See supra text accompanying notes 62-74, 197-206, and 206-17; see infra text accompanying notes 244-50.

<sup>237.</sup> IND. CODE § 35-46-1-4(a)(2) (1993).

"grounding" him.<sup>238</sup> The parents locked the boy into his bedroom at night for a two-week period and did not allow him to associate with his siblings during the daytime when the parents were not there. The parents pled guilty to the charges. After their motion to withdraw the pleas was denied, they were sentenced to suspended one-year terms. The convictions were overturned because the court concluded that as a matter of law this situation could not constitute "cruel confinement."<sup>239</sup>

This case demonstrates the power of a prosecutor in choosing when to apply this statute. These parents were arrested and originally charged with six counts of neglect of a dependent, all Class D felonies.<sup>240</sup> Each count of a Class D felony carries a potential penalty of imprisonment for a fixed term of one and one-half years, plus a possible fine of up to \$10,000.<sup>241</sup> That is a total possible penalty for each defendant in this case of imprisonment for nine years, plus a possible fine of \$60,000. Five of the counts were dropped and the sixth resulted in the conviction that was overturned.<sup>242</sup> The underlying concern is that a prosecutor has the power to place a parent in the position of having to defend against multiple felony charges for neglect of a dependent based on the seemingly innocent act of "grounding" the son.

Other examples include *State v. George*<sup>243</sup> and two similar cases, *State v. Kellogg*<sup>244</sup> and *State v. Kincaid*.<sup>245</sup> Each of these cases involved a parent who was operating a motor vehicle while under the influence of alcohol. Each parent was charged not only with the alcohol offense, but also with neglect of a dependent because each parent was accompanied by a minor child at the time. In *George*, the parent's blood alcohol content was 0.23 percent, but the defendant was found not guilty of the neglect charge because the jury felt that even though the statutory elements were met, the additional Class D felony charge was "being too hard on the mother." The prosecutor then decided to drop the neglect of a dependent charge in the *Kincaid* case<sup>247</sup> because the blood alcohol level was only 0.16 percent. Since the jury had nullified the neglect charge in *George* with a 0.23 percent blood alcohol level, the prosecutor did not see any point in trying the second, weaker case.<sup>248</sup>

- 238. Hartbarger v. State, 555 N.E.2d 485 (Ind. Ct. App. 1990).
- 239. *Id.* at 486-87 (This is an example of a case where the defendants admitted that they knowingly committed the act and they subjectively thought they were guilty of a crime, but since the conduct was not proscribed, using an objective standard, they could not be guilty of a crime.); *see supra* text accompanying notes 150-53.
  - 240. Hartbarger, 555 N.E.2d at 485.
  - 241. IND. CODE § 35-50-2-7(a) (1993).
  - 242. Hartbarger, 555 N.E.2d at 485-86.
- 243. State v. George, Trial No. 06D02-9303-CF95 (Boone County, Superior Court, Criminal Division 2, tried Nov. 17, 1993); see supra text accompanying notes 1-5.
  - 244. State v. Kellogg, Trial No. 30A01-9310-CR-337 (Ind. Ct. App., filed Dec. 15, 1993).
- 245. State v. Kincaid, Trial No. 06D02-9303-CF124 (Boone County, Superior Court, Criminal Division 2, tried Jan. 4, 1994).
- 246. Telephone Interview with Rebecca S. McClure, Boone County Prosecutor, in Lebanon, Ind. (Jan. 6, 1994).
  - 247. Kincaid, Trial No. 06D02-9303-CF124.
  - 248. Telephone Interview with Rebecca S. McClure, Boone County Prosecutor, in Lebanon, Ind. (Jan.

In Kellogg, a case in a different county and under a different prosecutor, the jury convicted the defendant for both the alcohol charge and the neglect of a dependent charge, along with several other offenses.<sup>249</sup> The defendant's blood alcohol level was 0.18 percent. The difference between the Kellogg conviction and the George acquittal is the George jury's decision to nullify. These two cases differ from the Kincaid case in that the prosecutor decided not to try the Kincaid case on the neglect of a dependent charge. As the Indiana Supreme Court stated in Downey, "It cannot be left to juries, judges, and prosecutors to draw such lines."<sup>250</sup>

But juries, judges, and prosecutors often have to draw such lines in a variety of situations and with many statutes.<sup>251</sup> That is the nature of law. The Neglect of a Dependent Statute is inherently flexible to give prosecutors a workable tool with which to protect dependents. This flexibility is both useful and necessary. It enables prosecutors to do a more effective job of protecting dependents from being placed in dangerous situations.<sup>252</sup> The key to the constitutionality tests is that the statute is tested "as applied." The statute passes the constitutionality test as long as it is "defined so that a person of ordinary intelligence can perceive the wrong intended to be prohibited."<sup>253</sup>

Another example of a use of the Neglect of a Dependent Statute that shows the great flexibility of the statute is a test case in Marion County in which a mother was indicted because her gun was used in an accidental shooting involving children.<sup>254</sup> The mother's twelve-year-old son took his mother's loaded .357-caliber Magnum revolver out from under a daybed and was showing it to friends when it discharged, injuring one of the children. A loaded shotgun was also within easy reach of the children. The grand jury's indictment of the mother on neglect of a dependent charges surprised even the prosecutor. He sent the charges to the grand jury thinking they would not indict. In the wake of a number of local shooting injuries involving children, the prosecutor intended to use this case as an example to make a plea to the Indiana General Assembly for a new statute mandating the responsible ownership of guns.<sup>255</sup>

With this great flexibility, many other examples could eventually turn into neglect charges: drag racing with a dependent in the car, speeding with a dependent in the car, failing to comply with the seat belt or child safety restraint laws,<sup>256</sup> and subjecting dependents to an environment of cigarette smoke. The Indiana Supreme Court used the examples of raising a child in a high-rise apartment and mopping a kitchen floor in the

<sup>6, 1994).</sup> 

<sup>249.</sup> State v. Kellogg, Trial No. 30D02-9207-CF00031 (Hancock County, Superior Court, Criminal Division 2, tried June 17-18, 1993).

<sup>250.</sup> State v. Downey, 476 N.E.2d 121, 123 (Ind. 1985).

<sup>251.</sup> Interview with Henry C. Karlson, Professor of Law, Indiana University School of Law—Indianapolis (January 12, 1994).

<sup>252.</sup> Telephone Interview with Rebecca S. McClure, Boone County Prosecutor, in Lebanon, Ind. (Jan. 6, 1994); Telephone Interview with Terry Snow, Hancock County Prosecutor, in Greenfield, Ind. (Jan. 7, 1994); Interview with Jeff Modisett, Marion County Prosecutor, in Indianapolis, Ind. (Jan. 7, 1994).

<sup>253.</sup> Rhinehardt v. State, 477 N.E.2d 89, 93 (Ind. 1985).

<sup>254.</sup> Kevin O'Neal, Jury Indicts Mother, INDIANAPOLIS NEWS, Dec. 24, 1993, at B2.

<sup>255.</sup> Interview with Jeff Modisett, Marion County Prosecutor, in Indianapolis, Ind. (Jan. 7, 1994).

<sup>256.</sup> IND. CODE §§ 9-19-11-2, -3 (1993).

presence of a small child as the "literal intendment of the provision, but . . . not a rational intendment." While some of these situations are more dangerous to one's life and health than others, they all fit the literal elements of neglect of a dependent. These examples show that the language of the Neglect of a Dependent Statute is quite broad and as the statute is currently written, it will probably be subject to more constitutional attacks in the future. While prosecutors need a flexible, workable tool to do an effective job of protecting dependents, more clarity and guidance is needed in Indiana's Neglect of a Dependent Statute.

#### III. PROPOSAL FOR A STATUTORY AMENDMENT

Many constitutional attacks and other problems could be avoided by amending the Neglect of a Dependent Statute. To begin, the word "may" should be struck from the statute to reflect the narrowing construction of the Indiana Supreme Court. The statute should also include language reflecting the court's mandate that "[t]he placement must itself expose the dependent to a danger which is actual and appreciable. Language should also be added stating that the placement can be a result of a positive act or a failure to act—an omission. The statute should also explain that an objective standard determines whether the situation is "dangerous," the confinement "cruel," or the missing support "necessary. The statute of the defendant that leads to the charge is knowing or intentional is to be determined using a subjective standard.

A statement of policy, showing the legislature's intended use of the statute, would also be helpful. While such statements are not normally given by the Indiana General Assembly, this statement would give prosecutors and grand juries more direction regarding how and when the statute should be applied. It would also give juries and judges some guidance for determining when a charge is too trivial. This policy statement would help "indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur." <sup>263</sup>

When another statute covers a specific situation, this policy statement could also state whether that more specific statute is meant to be the exclusive means of addressing that situation or whether the broader, more general neglect statute could also be used. When a statute addresses a specific situation, that statute should be written in a way that covers all such situations, so the neglect statute is not needed. An example is the statutes that require that a child be properly fastened and restrained by a child passenger restraint system or a seat belt in a motor vehicle.<sup>264</sup> A violation is a Class C infraction,<sup>265</sup> which

<sup>257.</sup> Downey, 476 N.E.2d at 123.

<sup>258.</sup> *Id.*; see supra text accompanying notes 24-27.

<sup>259.</sup> Downey, 476 N.E.2d at 123.

<sup>260.</sup> See supra text accompanying notes 57-58.

<sup>261.</sup> See supra text accompanying notes 15-23, 133-34, 151-52, 185-86, 191, and 194.

<sup>262.</sup> See supra text accompanying notes 171-73.

<sup>263.</sup> Downey, 476 N.E.2d at 123.

<sup>264.</sup> IND. CODE §§ 9-19-11-2, -3 (1993).

<sup>265.</sup> Id.

carries a penalty of up to \$500.<sup>266</sup> A person who operates a motor vehicle carrying a child who is not properly restrained places that child in a situation of actual and appreciable danger under the current Neglect of a Dependent Statute, which is a Class D felony.<sup>267</sup> The prevailing court interpretation is that the neglect statute can still be used, even when statutes which are specifically directed to a particular problem exist.<sup>268</sup> But the more specific child passenger restraint statutes in this situation should control. The violator should only be subjected to the penalty which the legislature mandated by those statutes that address that specific situation. If a stricter penalty is desired, the legislature should establish that public policy. "The authority to define crimes and establish penalties belongs to the legislature. A court cannot amend a statute or establish public policy. . . . ."<sup>269</sup>

The proposed statute is as follows:

- (a) A person having the legal care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:
  - (1) Places that dependent in a situation which is an actual and appreciable danger to the dependent's life or health;
  - (2) Abandons or cruelly confines the dependent;
  - (3) Deprives the dependent of necessary support; or
  - (4) Deprives the dependent of education as required by law; commits neglect of a dependent, a Class D felony. However, except for violation of clause (4), the offense is a Class B felony if it results in a serious bodily injury.

Whether a situation is an "actual and appreciable danger" in clause (1), a "cruel" confinement in clause (2), or a lack of "necessary" support in clause (3) is a question for the trier of fact, to be determined using an objective, reasonable person standard. That is, whether a reasonable person of ordinary intelligence would perceive it as so.

A "placement" in a dangerous situation under clause (1) may be achieved by either a positive act or a failure to act when action is necessary to prevent a dangerous situation from occurring. When considering a danger to a dependent's health, mental health is to be considered as important as physical health.

The word "cruelly" requires that the confinement is likely to result in a harm such as mental distress, extreme pain or hurt, or gross degradation, and yet does not necessarily endanger the dependent's life or health.

In determining whether support is "necessary" under clause (3), clause (1) should be used as a guide—whether a lack of the support in question constitutes a situation of actual and appreciable danger to the dependent's life or health.

<sup>266.</sup> IND. CODE § 34-4-32-4 (1993).

<sup>267.</sup> IND. CODE § 35-46-1-4(a)(1) (1993); see supra note 5.

<sup>268.</sup> See State v. Springer, 585 N.E.2d 27, 30 (Ind. Ct. App. 1992).

<sup>269.</sup> Downey, 476 N.E.2d at 123.

It is a defense that the accused person, in the legitimate practice of his religious belief, provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent.

- (b) If another statute is specifically directed to a particular situation, that more specific statute is intended to be the means by which that violation is addressed.
- (c) The purpose of this statute is to authorize the intervention of the State's police power to prevent harmful consequences and injury to dependents. Law enforcement officials need not await loss of life, limb, or property, but may intervene where conduct is sufficient to warrant belief that such an ultimate harmful consequence will ensue. The goal of this statute is the protection of dependents. When a person is responsible for the care of a dependent, that responsibility carries with it an accountability that is designed to ensure that the responsible person will not knowingly or intentionally do anything that a reasonable person would not do that endangers the life or the mental or physical health of the dependent.<sup>270</sup>

In addition to this proposed statute, other more specific statutes should be considered that would apply to commonly recurring situations to replace the use of the more general Neglect of a Dependent Statute. An example is the gun responsibility legislation currently being advanced by the Marion County Prosecutor, which is designed to keep loaded guns out of the reach of children.<sup>271</sup> Other solutions include reconsidering some of the current statutes and updating the penalties as necessary to promote the protection of dependents.

Another possible solution is to add to appropriate statutes, as an aggravating circumstance, that the involvement of a dependent leads to a greater penalty. An example is the Criminal Recklessness Statute, which proscribes a reckless, knowing, or intentional act that creates a substantial risk of bodily injury to another person. Use of a vehicle or a deadly weapon are both aggravating circumstances that result in greater penalties. The statute could likewise find an additional aggravating circumstance where the "other person" is a dependent. This would make the Criminal Recklessness Statute very similar to the Neglect of a Dependent Statute. An example that is already written into the Indiana Code involves the seat belt statutes. If a front seat passenger fails to use a seat belt, it is only a Class D infraction, a judgment of up to twenty-five dollars. But if that passenger is under four years old, it is then a Class C infraction, a judgment of up to \$500.277 Similarly, an aggravating circumstance could be added to the drunk driving

<sup>270.</sup> Subsection (b) of Ind. Code § 35-46-1-4, which deals with child selling, should be separated from the Neglect of a Dependent Statute and addressed in a separate section.

<sup>271.</sup> Interview with Jeff Modisett, Marion County Prosecutor, in Indianapolis, Ind. (Jan. 7, 1994).

<sup>272.</sup> IND. CODE § 35-42-2-2 (1993).

<sup>273.</sup> IND. CODE § 9-19-10-2 (1993).

<sup>274.</sup> IND. CODE § 9-19-10-8 (1993).

<sup>275.</sup> IND. CODE § 34-4-32-4(d) (1993).

<sup>276.</sup> IND. CODE §§ 9-19-11-2, -3 (1993).

<sup>277.</sup> IND. CODE § 34-4-32-4(c) (1993).

statutes,<sup>278</sup> saying that a greater penalty would ensue if a dependent is in the vehicle with a drunk driver. If such an amendment were proposed and not passed, that would indicate that the Neglect of a Dependent Statute should not be used in this situation.

#### **CONCLUSION**

Although these proposals do not solve all of the problems presented by the Neglect of a Dependent Statute, they do give juries, judges, and prosecutors clearer standards and more guidelines from the public-policy-establishing and the crime-and-penalty-establishing branch of our government. When coupled with the political pressure on prosecutors to serve the public well and the protection of the right to be tried by a jury of peers, these proposals will adequately provide "something to indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur." When "considered with the . . . concepts of [danger,] neglect, care, custody, control, dependent, places, life, and health, and in conjunction with the social problem dealt with, minimal due process notice requirements are met." 280

<sup>278.</sup> IND. CODE §§ 9-30-5-1, -2 (1993).

<sup>279.</sup> Downey, 476 N.E.2d at 123.

<sup>280.</sup> *Id*.

# PROPOSAL FOR A "LAWFUL" PUBLIC SCHOOL CURRICULUM: PREVENTIVE LAW FROM A SOCIETAL PERSPECTIVE

#### PATRICIA L. VAN DORN\*

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.<sup>1</sup>

#### INTRODUCTION

Preventive law has been defined as "that part of law . . . concerned with minimizing the risk of legal trouble and maximizing legal rights . . . at a time when transactional and similar facts are being considered and made." Arguably, much of the practice of law is preventive to some extent. Proper estate planning prevents a distribution of wealth contrary to the intentions of the testator; proper contract drafting prevents misunderstanding and possible court intervention; litigation itself prevents illegal self-help measures. Preventive law also has found merit within the field of education law, serving to keep teachers and administrators in the classroom rather than in the courtroom. However, many of the derivative benefits of preventive education law have yet to be realized. Viewing the law as a tool for prevention of litigation produces positive but localized effects. On the other hand, the infusion of knowledge of the law, including rights and duties arising from the law, into society itself could unleash explosive and widespread positive outcomes.

Other professions have had major successes in the preventive arena by using a broad-based societal approach. For example, in preventive medicine, poliomyelitis and smallpox are virtually eliminated by vaccinating children before disease organisms invade their bodies.<sup>4</sup> Preventive dentistry touts a significant reduction in the rate of dental cavities by fluoridation of the water supply which allows the developing tooth to incorporate the fortifying element within its matrix.<sup>5</sup> In both of these comprehensive

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<sup>1.</sup> Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

<sup>2.</sup> Lou Brown's Preventive Law Glossary, Part III, 7 PREVENTIVE L. REP., Dec. 1988, at 27, 27 (quoting Brown, An Inquiry into Whether Preventive Law Should be Ranked as a Specialty, Legal Specialization, Special Committee on Specialization, American Bar Association, 1976, at 61).

<sup>3.</sup> See William C. Bednar, Jr., The Common Goal: A Case Predicted Is a Lawsuit Prevented, 10 PREVENTIVE L. REP., June 1991, at 7.

<sup>4.</sup> Jane Sisk, The Cost of Prevention: Don't Expect a Free Lunch, 269 JAMA 1710, 1710 (1993).

<sup>5.</sup> *Id*.

endeavors, early introduction of the preventive entity demands that the target population must be children. The effect is that controlling precautionary measures are in place before threshold disease-producing elements attack.

Because attitudes concerning self and others also are formed early, a direct inculcation of the principles of law with the corresponding set of positive social values also can be directed to young members of society in order to help prevent unlawfulness and violence. The formal public school curriculum offers the best opportunity to optimize this power of the law as a preventive rather than merely a remedial agent. Although constitutional, contract, property, and criminal law offer fertile subjects for inclusion within a school curriculum at later grades, tort law embodies legitimate, consensual values appropriate for introduction as early as pre-school and should serve as the discipline first introduced in a comprehensive law-related educational program. Inclusion of a law-based, values-rich program need not supplant the role of the parent nor violate First Amendment rights. Rather, it could complement the modern family structure and its limitations while demonstrating the balance between freedom to act and duty not to act in a principled society.

This Note is grounded on the belief that ownership of the law is vested not only in the well-bred, the well-educated, and the well-heeled; on the contrary, it is the birthright of every citizen. Furthermore, it should be affirmatively administered rather than imposed primarily after its limits are violated. The public school provides an environment conducive for dissemination of law-based principles. This writing presents an overview of the school environment and of court decisions affecting the legitimacy of value inculcation within the public school. It reviews several state responses to the need for education in values and limited community responses along with a proposal for a compulsory proactive law-based curriculum based on tort law principles. Although developing a detailed methodology is reserved for experts in other fields, the Note discusses general parameters. Tort law principles are largely nonstatutory and processoriented and, when used as the basis of a school program, must respect First Amendment limitations. An exploration of these proscriptions is included and advantages are delineated.

#### I. THE SCHOOL ENVIRONMENT

## A. The School Population

1. Pupil Profile.—The school has been called the "microcosm of society";<sup>6</sup> in addition, a significant part of the American citizenry is composed of school children. Of a population of 249,924,000 in 1990,<sup>7</sup> an estimated 29,742,000 children were enrolled in public school grades kindergarten through eight, and approximately 11,284,000 in grades nine through twelve.<sup>8</sup> Projections to the year 2000 are for an increase to 33,032,000 and

<sup>6.</sup> Microcosms of Society, 47 TEX. B.J. 250, 251 (1984) (attributed to Leon Jaworski).

<sup>7.</sup> Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the U.S. 14, Table 12 (1992).

<sup>8.</sup> Id. at 141, Table 215.

13,507,000 respectively. Notably, more than 16% of the population is in a public elementary or secondary school setting.

During the past several decades, major alterations have occurred in the families from which these children come. For example, the number of families composed of a male head of household with no spouse but with one natural or adopted child under eighteen rose by 108.9% from 1970 to 1980 and by a further 87.4% from 1980 to 1991. The number of families with a female head of household and no spouse present with one natural or adopted child under eighteen rose 137.9% from 1970 to 1980 and 36.9% from 1980 to 1991. One-parent families with more than one child also have increased significantly. This phenomenon, along with the increased number of families in which both parents work, has resulted in the "latchkey kid," who receives less quality adult contact and fewer opportunities for moral education from those adults. As pupils are consolidated into larger schools and others are bussed away from local schools, the community, once an additional source of value training for the child, becomes a less dominant force. These societal shifts create new challenges for the schools.

2. Order and Discipline.—Teachers are aware of the resultant new burdens placed upon their profession. In a 1991 study, 89% of teachers after their first year of teaching agreed or strongly agreed with the statement, "[m]any children come to school with so many problems that it's very difficult for them to be good students." <sup>15</sup>

These "problems" are evidenced in part by violent and disruptive behavior within the school environment. In 1990, 6.7% of attempted robberies occurred inside schools or on school property, as did 4.0% of completed robberies, 13.8% of simple assaults, 6.2% of aggravated assaults, and 5.4% of personal larcenies with contact. Street gang membership has increased, especially among Hispanic, Asian/Pacific Island, and Black student populations. Incidents of violence and drug use are almost commonplace, including alcohol and other illegal drug use, student possession of weapons, trespassing, vandalism of school property, as well as both physical and verbal abuse of teachers.

<sup>9.</sup> Id.

<sup>10.</sup> OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, U.S. DEP'T OF EDUC., DIGEST OF EDUC. STATISTICS 25, Table 17 (1992) [hereinafter DIGEST].

<sup>11.</sup> *Id*.

<sup>12.</sup> *Id.* For a history of divorce law and its economic, religious, and cultural facets, see Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649 (1984).

<sup>13.</sup> Eagan Hunter, Our Self-Destructive Youth: A Look at the Problems and Their Causes, NASSP BULL., Jan. 1993, at 52, 54.

<sup>14.</sup> James S. Coleman, Changes in the Family and Implications for the Common School, 1991 U. CHI. LEGAL F. 153, 167 (1991).

<sup>15.</sup> Metropolitan Life/Louis Harris Associates, Inc., *The American Teacher*, 1991, DIGEST OF EDUC. STATISTICS, at 82, Table 72 (1992) [hereinafter *American Teacher*, 1991].

<sup>16.</sup> BUREAU OF THE CENSUS, supra note 7, at 185, Table 297.

<sup>17.</sup> OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 1992, at 17 (1992).

<sup>18.</sup> DIGEST, *supra* note 10, at 137, Table 138.

<sup>19.</sup> DIGEST, supra note 10, at 137, Table 138.

<sup>20.</sup> DIGEST, supra note 10, at 140, Table 141.

Students, too, acknowledge intrusions upon their peace and the resultant negative impact upon the learning process. In a United States Department of Education study of eighth graders in 1988, 77.9% agreed or strongly agreed that other students often disrupt class; 11.8% did not feel safe at their school; 39.6% believed that disruptions by other students interfered with their learning; and 52.8% believed students who misbehave were often unchastised.<sup>21</sup> It seems obvious that, if learning is to improve, the number of destructive disruptions to the academic process must decrease. This necessitates a focus on non-academic social conduct. Authorities acknowledge that, with less positive socialization by traditional channels, the schools must take a more proactive role in the non-academic development of a child, both individually and societally.

In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools. . . . The lesson of discipline is not merely a matter of the student's self-interest in the shaping of his own character and personality; it provides an early understanding of the relevance to the social compact of respect for the rights of others. The classroom is the laboratory in which this lesson of life is best learned.<sup>22</sup>

#### B. Guidance From the Court

1. Dual Agency—Parent Substitute and State Actor.—The authority of the school was originally based on the principle of "in loco parentis," but as early as 1943, the Supreme Court formally recognized the school's position as state authority: "[T]he Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." This status was referenced by Justice Black in 1969<sup>25</sup> and by the Court in 1977 when it noted that "[a]though the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view—more consonant with compulsory education laws—that the State itself may impose such corporal punishment as is reasonably necessary." However, in Ingraham v. Wright, the Court, in a five to four decision, helding that: (1) the Eighth Amendment does not apply to public school teachers or administrators who use corporal punishment for

<sup>21.</sup> DIGEST, supra note 10, at 135, Table 135.

<sup>22.</sup> Goss v. Lopez, 419 U.S. 565, 593 (1975) (Powell, J., with whom Burger, C.J., and Blackmun and Rehnquist, JJ., joined, dissenting). The dissenting justices did not agree with the majority that a school suspension for up to ten days violated constitutional due process.

<sup>23.</sup> See John C. Hogan & Mortimer D. Schwartz, In Loco Parentis in the United States 1765-1985, 8 J. LEGAL HIST. 260 (1987).

<sup>24.</sup> West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

<sup>25.</sup> Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 516 (1969) (Black, J., dissenting) ("[T]he elected school officials and the teachers [are] vested with state authority.").

<sup>26.</sup> Ingraham v. Wright, 430 U.S. 651, 662 (1977) (citation omitted) (emphasis added).

<sup>27.</sup> Justice White filed dissenting opinion in which Justices Brennan, Marshall, and Stevens joined. Justice Stevens also filed a dissenting opinion.

disciplinary reasons,<sup>28</sup> and (2) the Due Process Clause of the Fourteenth Amendment does not require prior notice and an opportunity to be heard before reasonable corporal punishment is imposed by school personnel.<sup>29</sup>

Although the identification of school as a creature of the state is firmly established, the doctrine of in loco parentis has not been entirely abandoned. In his Goss v. Lopez dissent, Justice Powell spoke of the teacher's role as a "parent-substitute." In his concurring opinion in New Jersey v. T.L.O., decided eight years after Ingraham, Powell declared that "teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child." The principle gained vitality in another post-Ingraham Supreme Court decision, Bethel School District v. Fraser. Referring to prior decisions, Chief Justice Burger, writing for the majority, noted that "[t]hese cases recognize the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." As the dicta in Bethel suggests, the concept of the school as a state figure has not wholly supplanted the doctrine of in loco parentis so that, at some level, these principles co-exist.

Uncertainty about the role and scope of authority of school teachers and administrators has led to increased court intervention so that judges—who are sometimes "at least two generations and 3,000 miles away"<sup>34</sup>—resolve the ambiguities. Accordingly, courts were forced to determine that a school could exclude a student who brought an automatic weapon and ammunition to school;<sup>35</sup> that a one-day suspension for wearing a shirt declaring "Drugs Suck!" did not violate due process rights;<sup>36</sup> and that Indian students could challenge enforcement of a school's dress code restricting the hair length of male students.<sup>37</sup>

2. Traditional Republicanism and Liberalism.—The tension created by attempts to define the boundaries of school authority<sup>38</sup> can be viewed within the context of the traditional republican-liberal debate. Classical republicanism focuses on civic virtue and participatory government, as opposed to liberalism, which spotlights individual rights and governmental constraints.<sup>39</sup> Although these models depict only "implicit tendencies,"<sup>40</sup>

<sup>28.</sup> Ingraham, 430 U.S. at 671.

<sup>29.</sup> Id. at 682.

<sup>30. 419</sup> U.S. 565, 594 (1975) (Justice Powell, with whom Burger, C.J., and Blackmun and Rehnquist, JJ., joined, dissenting).

<sup>31. 469</sup> U.S. 325, 348 (1985) (Powell, J., with whom O'Connor, J., joined, concurring).

<sup>32. 478</sup> U.S. 675 (1986).

<sup>33.</sup> Id. at 684.

<sup>34.</sup> *Id.* at 692 (Stevens, J., dissenting). *See also* Bednar, *supra* note 3, at 7 (noting the number of court cases involving education law).

<sup>35.</sup> Carey v. Maine Sch. Dist., 754 F. Supp. 906 (D. Maine 1990).

<sup>36.</sup> Broussard v. School Bd. of Norfolk, 801 F. Supp. 1526 (E.D. Va. 1992).

<sup>37.</sup> Alabama and Coushatta Tribes of Tex. v. Trustees of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319 (E.D. Tex. 1993).

<sup>38.</sup> See Betsy Levin, Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School, 95 YALE L.J. 1647 (1986).

<sup>39.</sup> GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 19 (2d ed. 1991).

generally the traditional republican is said to believe that law has a positive role in constructing a community while the liberal views law as a necessary evil.<sup>41</sup> Applying these perspectives to the school setting, the republican objective is for "individuals to join together in public life for the preservation and advancement of the community. The skills necessary for full participation in the political life of the community, the skills necessary for full citizenship, are those provided by education."<sup>42</sup> In contrast, the liberal position emphasizes "equal educational opportunity," and directs that "the instruments for attaining and protecting equal opportunity are the equal protection and due process guarantees against discriminatory action against individuals."<sup>43</sup>

The Supreme Court also has entered this debate within the context of the public schools. The often-cited quote from Tinker v. Des Moines Independent School District, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" embodies a more liberal position. The Tinker Court found that students who wore black armbands to public school in protest of the Viet Nam War were protected by the First Amendment's Free Speech Clause. However, this opinion hinted at the possible limitations of its holding by describing the protected speech as a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners . . . [with] no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." 46

Again, with a somewhat liberal leaning, the Court in Goss v. Lopez, by a narrow margin, found that a state-created property interest in education was protected by the Due Process Clause and "may not be taken away for misconduct without adherence to the minimum procedures required by that Clause." The suspension of a student for up to ten days without notice or hearing was held invalid, and the statutory provision that allowed such suspensions was proclaimed unconstitutional. 48

Four years later, in another close decision, the Court upheld a New York state education law forbidding employment of aliens as primary or secondary schoolteachers if they qualified for United States citizenship but made no attempt to become naturalized.<sup>49</sup> Exhibiting a strongly republican perspective, Justice Powell, writing for the majority, explained that the role of school teachers—like police officers,<sup>50</sup> and persons occupying state elective or key nonelective executive, legislative and judicial

- 40. Morton J. Horwitz, History and Theory, 96 YALE L.J. 1825, 1833 (1987).
- 41. Id. at 1833-34.
- 42. James Gordon Ward, Legal Issues for School Reform, in THE PRINCIPAL'S LEGAL HANDBOOK 303 (1993).
  - 43. Id. at 302.
  - 44. 393 U.S. 503, 506 (1969).
  - 45. Id. at 514.
  - 46. Id. at 508 (emphasis added).
  - 47. 419 U.S. 565, 574 (1975) (5-4 decision).
  - 48. Id. at 574-75.
- 49. Ambach v. Norwick, 441 U.S. 68 (1979) (Blackmun, Brennan, Marshall, and Stevens, JJ., dissenting).
  - 50. Id. at 74 (citing Foley v. Connelie, 435 U.S. 291, 297 (1978)).

positions<sup>51</sup>—is so "bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government."<sup>52</sup> This special function of the teacher in developing an "understanding of the role of citizens in our society"<sup>53</sup> was found to lie in all teachers, not just those involved with teaching history and government.<sup>54</sup> In finding the constitutionally-mandated rational relationship between the requirement for citizenship and legitimate state interests, Justice Powell spoke of the influence of teachers upon "the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy."<sup>55</sup> Although quite supportive of the view that educators have an obligation to remain involved with the inculcation of values, arguably this decision is not purely republican in nature. Education in fundamental values necessarily includes education regarding liberty interests that are protected from unconstitutional governmental interference.<sup>56</sup>

In 1982, the competing philosophies were again counterpoised in *Board of Education*, *Island Trees v. Pico*,<sup>57</sup> where the Court reviewed the actions of a school board in removing books from the library. In his concurring opinion, Justice Blackmun spoke of the need to harmonize the inculcative function of the schools and the First Amendment's prohibition on "prescriptions of orthodoxy." The school library was differentiated from the regular school curriculum and the Court held that the local school board could not remove books from the library merely because it disapproved of the concepts therein. The motivation behind the board's actions was a key factor. The Court implied that it would be more receptive to claims based on vulgarity or educational unsuitability. The school is actions was a key factor.

Although the more liberal position prevailed, the Court was considering a motion for summary judgment, which demanded that all evidence be construed in a manner most favorable to the party seeking removal of the books.<sup>61</sup> This case was also narrowly decided. Chief Justice Burger's dissenting opinion, joined by Justices Powell, Rehnquist and O'Connor, expounded:

Today the plurality suggests that the *Constitution* distinguishes between school libraries and school classrooms, between *removing* unwanted books and *acquiring* books. Even more extreme, the plurality concludes that the Constitution *requires* school boards to justify to its teenage pupils the decision

- 51. *Id.* (citing Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).
- 52. Id. at 73-74.
- 53. Id. at 78.
- 54. Id. at 79-80.
- 55. Id. at 79 (citations omitted).
- 56. See infra notes 66-67, 175-84 and accompanying text.
- 57. 457 U.S. 853 (1982) (plurality decision).
- 58. Id. at 879 (Blackmun, J. concurring in part and concurring in the judgment).
- 59. Id. at 875 (plurality opinion).
- 60. *Id.* at 871. The books had originally been placed in the library by school authorities and the school board acted contrary to the recommendations of the Book Review Committee appointed by the board itself. *Id.* at 857-58.
  - 61. FED. R. CIV. P. 56.

to remove a particular book from a school library. I categorically reject this notion that the Constitution dictates that judges, rather than parents, teachers, and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom.<sup>62</sup>

The Court again focused on individual rights in 1985 when, in *New Jersey v. T.L.O.*, 63 it held that the Fourth Amendment applied to searches by school officials. In this decision, which included five separate opinions, the Court spoke of the balancing of rights and authority in light of present social order:

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.<sup>64</sup>

In addition, the Court recognized the school as a unique entity requiring a distinctive application of liberty concepts: "[T]he preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." In his separate opinion, Justice Brennan voiced the more liberal perspective: "It would be incongruous and futile to charge teachers with the task of embuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections." Justice Stevens further charged:

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from school teachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance.<sup>67</sup>

Later in that decade, the pendulum again shifted in favor of school control when the Supreme Court held that the school possessed authority to temporarily suspend a student

<sup>62.</sup> *Pico*, 457 U.S. at 893 (Burger, C.J., dissenting).

<sup>63. 469</sup> U.S. 325 (1985) (holding that a search of a student's purse was reasonable and thus did not violate Fourth Amendment).

<sup>64.</sup> Id. at 339 (citation omitted).

<sup>65.</sup> Id. See also Prince v. Massachusetts, 321 U.S. 158, 170 (1944) ("[W]ith reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms ....")

<sup>66.</sup> T.L.O., 469 U.S. at 354. (Brennan, J., with whom Marshall, J., joined, concurring in part and dissenting in part).

<sup>67.</sup> Id. at 385-86 (Stevens, J., with whom Marshall, J., joined, concurring in part and dissenting in part).

for using offensive but not legally obscene language in a nominating speech at a school assembly. The majority of the Court subordinated the right of free speech to that of the school's authority. Chief Justice Burger quoted *Tinker* with approval, "I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." In one of the more pro-republican decisions, the Court adopted the position: "[P]ublic education *must* prepare pupils for citizenship in the Republic. . . . It *must* inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." The Court elaborated:

[B]ut these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibility of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.<sup>71</sup>

Again, recognizing the uniqueness of the school setting, the Supreme Court indicated: "[I]t does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school."<sup>72</sup>

Approximately eighteen months later, again within the context of freedom of speech, the Court in *Hazelwood School District v. Kuhlmeier* <sup>73</sup> solidified its support of school authority. With Justices Brennan, Marshall and Blackmun dissenting, the *Hazelwood* Court held that high school administrators did not violate the First Amendment by "exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions [were] reasonably related to legitimate pedagogical concerns." The Supreme Court again acknowledged the exceptional limitation on rights of free speech within the character of the public school: "A school need not tolerate student speech that is inconsistent with its 'basic educational mission' even though the government could not censor similar speech outside the school." This Court distinguished *Tinker*, which dealt with the school's lack of authority to silence a student's personal views displayed on an armband worn by that student on the school grounds, from the school's authority in regard to a school newspaper which

<sup>68.</sup> Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

<sup>69.</sup> Id. at 686 (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 526 (1969)).

<sup>70.</sup> *Id.* at 681 (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968) (emphasis added)).

<sup>71.</sup> Id. (emphasis added).

<sup>72.</sup> Id. at 682.

<sup>73. 484</sup> U.S. 260 (1988).

<sup>74.</sup> Id. at 273.

<sup>75.</sup> Id. at 266 (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986)).

<sup>76.</sup> See supra notes 44-46 and accompanying text.

"students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."<sup>77</sup>

The present composition of the Supreme Court differs from that of the Courts deciding the preceding cases. Two of the staunchest supporters of individual rights and the liberal position have retired.<sup>78</sup> Because the decisions favoring individual rights were decided by narrow margins, the most recent decisions have favored the more republican point of view, and the highest Court has lost its more liberal supporters, it is reasonably predictable that inculcation of legitimate values by public school authorities would be, if not actively promoted, at least met with a high degree of tolerance by the present United States Supreme Court.

### II. LIMITED PROACTIVE RESPONSE

Government officials from presidents to prosecutors have reacted to the perceived need for improving citizenship education within the schools. "[M]aking this land all that it should be" is the motto of America 2000, a nine year plan developed by the chief executives of the national and state governments.<sup>79</sup> President Bush proposed: "Think about every problem, every challenge we face. The solution to each starts with education. For the sake of the future, of our children['s] and of the nation's, we must transform America's schools. The days of the status quo are over."<sup>80</sup>

America 2000 formulated six goals. Goal Number Three addressed student achievement and citizenship. It stressed preparing for both "responsible citizenship" and "productive employment." Goal Number Six stated: "By the year 2000, every school in America will be free of drugs and violence and will offer a disciplined environment conducive to learning."

The federal legislative branch also has become involved in the campaign to improve the public schools. The United States Senate has conducted hearings on school violence<sup>83</sup> and both Houses have endorsed legislation with the purpose of improving safety at the school.<sup>84</sup> However, this form of federal action has been limited, perhaps because of the general recognition that states should play the major role as protagonists for change.<sup>85</sup>

- 77. Hazelwood, 484 U.S. at 271.
- 78. Justices Brennan and Marshall, who endorsed the liberal perspective, were replaced with Justices Souter and Thomas, respectively. In addition, Justice Ginsburg now sits on the court in the place of Justice White, and Justice Breyer succeeded Justice Blackmun.
- 79. AMERICA 2000, AN EDUCATION STRATEGY. Culmination of summit held by President Bush with 50 state governors in Charlottesville, Va. on Apr. 18, 1991 (on file with author).
  - 80. Id. at 2000-02.
  - 81. Id. at 2000-62.
  - 82. Id. at 2000-65.
- 83. See, e.g., Children Carrying Weapons: Why the Recent Increase, Hearing before the Sen. Comm. on the Judiciary, 102d Cong., 2nd Sess. (1992).
- 84. See, e.g., Gun-Free School Zones Act of 1990, 18 U.S.C. § 921 (1990). The Fifth Circuit Court of Appeals held that section 922 (q) was "invalid as beyond the power of Congress under the Commerce Clause." United States v. Lopez, 2 F.3d 1342, 1368 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536.
  - 85. See, e.g., Bill Clinton, Priority Issues for the States as Educational Reform Continues, 1 STAN. L

Several states have accepted this challenge and developed a direct approach to incorporation of value education into the curriculum. The Oregon State Board of Education recommended that "character education" be mandated throughout that state and the North Clackamas School District responded. The district superintendent invited community groups to suggest desirable character traits to be promoted within the elementary and secondary school system. The group determined that thirteen attributes mirrored the moral values of that community: patriotism, integrity and honesty, courtesy, respect for authority, courage, self-esteem, compassion, self discipline and responsibility, work ethic, appreciation for education, patience, respect for others and property, and cooperation. These values were to be cultivated over a four-year period, with several highlighted each year. Kentucky, too, used the task force approach to make recommendations for value and character education in that state. Committee members represented educators, parents, the legislature, state and local school boards, law enforcement agencies, higher education, Catholic archdioceses, and three private institutes. So

San Ramon, California developed a character education program based on character traits defined by the creators of the program rather than by community consensus.<sup>90</sup> The United States Constitution and Bill of Rights served as the basis of a character education program formulated by the Baltimore County Public Schools of Towson, Maryland task force.<sup>91</sup> Those values recommended for inclusion in a school program were: compassion, courtesy, critical inquiry, due process, equality of opportunity, respect for others' rights, honesty, rule of law, integrity, knowledge, loyalty, justice, objectivity, order, patriotism, rational consent, reasoned argument, freedom of thought and action, responsibility, responsible citizenship, tolerance, truth, human worth, and dignity.<sup>92</sup>

The Ohio State Department of Education enumerated ten core values for use within its character education program: compassion, courtesy, tolerance, honesty, self-discipline, diligence, responsibility, self-respect, courage, and integrity.<sup>93</sup> School districts were

- 86. Richard Beswick, Character Education, OR. SCH. STUDY COUNCIL BULL., May 1992, at 14-20.
- 87. Id. at 14.
- 88. Id.

- 90. Beswick, supra note 86, at 20.
- 91. Beswick, supra note 86, at 20.
- 92. Beswick, supra note 86, at 20.

<sup>&</sup>amp; POL'Y REV. 5, 6 (1989). See also R. Freeman Butts, Analysis of Civic Education in the United States: National Standards and Civic Education in the U.S. Paper presented at the International Conference on Western Democracy and Eastern Europe: Political, Economic and Social Changes (East Berlin, Germany, Oct. 18, 1991), at 7 (author states that the general consensus of the National Education Goals Panel "seemed to be" that a uniform national curriculum was not desired, although national goals and national standards were seen as advantageous) (on file with author).

<sup>89.</sup> Fonda P. Butler, Comparing the Values Hierarchy of the Kentucky Department of Education's Character/Values Task Force. Comparing a Character/Values Task Force to a National Sample. Paper presented at the Annual Meeting of the Mid-South Educational Research Association (Little Rock, Ark., Nov. 8-10, 1989) (abstract of paper on file with author).

<sup>93.</sup> CHARACTER EDUCATION IN OHIO: SAMPLE STRATEGIES. Ohio State Dep't of Educ., Columbus 1 (1990).

encouraged to refine these and to incorporate them throughout the school activities, including guidance programs, athletics, special assemblies, and the student code of conduct.<sup>94</sup>

In some instances, communities themselves have taken the initiative to provide junior citizens with a level of value training within the school setting. Some communities have permitted parents to choose among schools, including private schools. 95 Other programs are based on volunteerism. "Tribes" is a broad-based example of such an approach. focusing on teamwork and social skills with four "norms" which are introduced at the elementary school level: no put downs; the right to "pass" in a social situation (choose not to actively participate); attentive listening; no names and no gossip. 96 Prosecutors. too, have become involved in working as resource persons within the schools. A program called Legal Lives, introduced by cities into their school programs, consists of a thirty week curriculum of problem solving and conflict resolution.<sup>97</sup> Prosecutors or deputy prosecutors use fact scenarios to stimulate discussion among fifth graders attending those schools that choose to participate. 98 Other volunteer-based approaches are available to school districts or to individual teachers if they choose to participate. An example is Project LEAD (Legal Education to Arrest Delinquency), which includes a manual titled "Putting Yourself in the Other Person's Shoes" consisting of fourteen activities depicting the role of laws and decision making in conformance with the law. 99 In addition, public and private interest groups provide resource materials for use within the school classrooms. 100

Although there is a definitive movement within states and communities to utilize public schools for value inculcation, some of which is law-oriented, the effort is fragmented and typically optional. In addition, target groups are often older pupils, whose basic attitudes are more firmly established than those of younger children. Because all students are held to a level of accountability for knowing the law and for abiding by its directives, a comprehensive and compulsory form of value education based upon principles of law should be mandated and instigated when children enter school.

<sup>94.</sup> Id. at 19-21.

<sup>95.</sup> See Stephen D. Sugarman, Using Private Schools to Promote Public Values, 1991 U. CHI. LEGAL F. 171 (1991).

<sup>96.</sup> Telephone Interview with Lauri Waldner, *Tribes* Coordinator, Noblesville Elementary Schools, Noblesville, Indiana (Oct. 21, 1993), regarding Jeanne Gibbs, *TRIBES: A Process for Social Development and Cooperative Learning* (on file with author). Notably, the *Tribes* coordinator distinguished the "social skills" upon which *Tribes* is established from "value education."

<sup>97.</sup> Telephone Interview with Jan Lesniak, Marion County, Indiana, Office of the Prosecutor (Oct. 26, 1993).

<sup>98.</sup> Id.

<sup>99.</sup> LEAD has been used by 27 Indiana counties with 11,043 students participating. Lawyers and other members of the judicial system serve as resource persons. For information, contact Dorothy Campbell, 9245 Meridian St., Suite 118, Indianapolis, IN 46260-1812.

<sup>100.</sup> For example, The Center to Prevent Handgun Violence cooperated in providing information to school systems to teach children about the dangers of handguns. One result, *No Guns For Me!*, is an activity book that demonstrates the dangerous nature of guns and advises children to stay away from guns. It was written for the early elementary grades. PAT HOBBY, NO GUNS FOR ME! (Rick Detorie, illus., 1990).

## III. PROPOSED PROACTIVE "LAWFUL" RESPONSE

#### A. Rationale

A comprehensive "Citizenship Education Program" could be based on a tri-partite view of citizenship: national, state, and community. The Constitution with its Amendments and Bill of Rights would serve as the foundation for national citizenship education and should be a vital part of a public school curriculum of law-related education. History, government, and civics courses normally incorporate a degree of constitutional law within their subject matter. 102

State citizenship includes rights and duties under both criminal and tort law. These now separate disciplines were not differentiated in early history but were both part of the system of primitive law developed to "preserve the peace and to prevent the use of force by one person against another or another's possession of property." Today, a positive correlation remains between criminal and tort law, with a sharing of "punitive" elements and nomenclature. Children have been held accountable for their actions in both areas. Although the common law rested on the presumption that a child between seven and fourteen years of age could not form criminal intent, jurisdictions today vary somewhat concerning the authority of the state to punish a juvenile offender. However, modern day law students are regularly exposed to the decision in *Garratt v. Dailey* where a child of five years and nine months was found liable for tortious battery. In the interests of fairness and justice, the state, who is the party prosecuting criminal actions against children and whose courtrooms are used to maintain civil claims against them, must take

<sup>101.</sup> The Office of Education defines "law-related education" as "those organized learning experiences that provide students and educators with opportunities to develop the knowledge and understanding, skills, attitudes, and appreciations necessary to respond effectively to the law and legal issues in our complex and changing society." Janice K. Colville & Rodney H. Clarken, *Developing Social Responsibility Through Law-Related Education*, at 6. Paper presented at the Annual Meeting of the American Education Research Association (San Francisco, Cal., Apr. 20-24, 1992). An example of a law-related educational program is CIVITAS, which draws upon both the classical republican tradition and the liberal view of citizenship. It embraces "fundamental values" (the public good; individual rights; justice; equality; diversity; truth; patriotism) and "fundamental principles" (popular sovereignty; constitutional government with separation of powers and checks and balances; separation of church and state; federalism; conflicts among fundamental principles). Butts, *supra* note 85, at 12-14.

<sup>102.</sup> For a collateral discussion of "facts" related in history texts, see Stephen E. Gottlieb, In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools, 62 N.Y.U. L. REV. 497 (1987).

<sup>103.</sup> PAGE KEETON & ROBERT E. KEETON, CASES AND MATERIALS ON THE LAW OF TORTS 1 (2d ed. 1977).

<sup>104.</sup> See Tim A. Thomas, Annotation, Defense of Infancy in Juvenile Delinquency Proceedings, 83 A.L.R. 4th 1135 (1991).

<sup>105. 279</sup> P.2d 1091 (Wash. 1955). The Supreme Court of Washington remanded for clarification of whether the "substantial certainty" test had been met. The trial court entered a judgment for plaintiff and the judgment was affirmed by the Supreme Court of Washington. 304 P.2d 681 (1956). See also Randall K. Hanson, Parental Liability, 62 St. B. Wis. 24 (1989) (discussing liability of parents for children's wrongful conduct—Wisconsin jurisdiction).

responsibility for educating these children regarding their accountability under the law. Government has a legitimate interest, and arguably, a legitimate *duty* to remove ignorance of its laws.

Nevertheless, even though criminal law principles are beginning to be successfully integrated into various public school programs, <sup>106</sup> the direct employment of formal tort law principles in public school curricula has been tapped only superficially. Unlike disciplines involved principally with economic relationships (e.g., contract law), which are more appropriately introduced at an older age, tort law, which implicates social relationships and correlating duties of citizens to other citizens, <sup>107</sup> could be assimilated into a curriculum at a very early age. Furthermore, this approach invites the community to become involved by defining the distinctive needs of its citizens and by tailoring a formal program to satisfy those needs.

Using tort law as the nucleus for the inculcation of values by introducing its principles into a formal, mandatory public school program originating at the pre-school or kindergarten level could result in schools that are safer, classrooms that are more conducive to learning, and a society that has notice of its duties under the law.

Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.<sup>108</sup>

# B. Citizenship Education—The Visible Curriculum

American tort law has long protected an individual's interests in freedom from harmful or offensive bodily contact, apprehension of harmful or offensive contact, confinement, baseless invasions of good reputation, infliction of emotional distress, and interference with exclusive possession of chattels and of land. <sup>109</sup> In addition to protecting against intentional invasions of these interests, tort law protects against negligent intrusions and charges a child to use the degree of care of a reasonable child, *i.e.*, a child of her age, intelligence and experience. <sup>110</sup> From these principles, legitimate meritorious "values" can be extracted and used to develop a comprehensive, direct, and indirect school program that is both academic and conduct-oriented.

<sup>106.</sup> See, e.g., P. David Kurtz & Elizabeth W. Lindsay, A School-Juvenile Court Liaison Model for the Prevention of Juvenile Delinquency, JUV. & FAM. CT. J., Winter 1985-86, at 9.

<sup>107.</sup> Admittedly, the duties that citizens owe to other citizens can be regarded as part of other legal disciplines. In this Note, however, the duty of every citizen to other citizens is distinguished from the system of criminal law where the state is a party to an action and from contract law where an affirmative act of the citizen is involved.

<sup>108.</sup> New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., with whom O'Connor, J., joined, concurring).

<sup>109.</sup> See generally RESTATEMENT (FIRST) OF TORTS (1934).

<sup>110.</sup> Id. § 283.

One core premise of such a program is self-worth, founded upon the interests in the integrity of one's psychological and physiological well-being.<sup>111</sup> "The higher a student's self-esteem, the more likely it is she will treat others with respect and fairness; the more likely it is she will find ways to get along well with others and get them to respond positively to her."<sup>112</sup> Other benefits of positive self-worth are increased security, ability to cope with adversity and diversity, and amenability to accept challenges and frustrations as part of the learning process.<sup>113</sup> Physical safety and emotional security are two vital elements of self-esteem<sup>114</sup> and likewise are incorporated in tort law precepts. Additional aspects of self-esteem such as identity, affiliation, competence, and mission<sup>115</sup> could also be developed by using the philosophy cradled within tort law.

A second proposition central to a tort-based school program is acknowledgment of the worth of others and acceptable conduct based on that premise. Using the vernacular of the Supreme Court, this element includes attention to the "sensibilities of fellow students" and addresses the "interest in teaching students the boundaries of socially appropriate behavior." Respect for others, it should be noted, includes an understanding and acceptance of diversity, be it gender, race, religion or other basis.

The anticipated goal of a direct tort law based curriculum is to develop within a child intrinsic control based on the values self-respect and respect for others. In contrast, an externally disciplined person "is like a puppet on a string. . . . [H]e does not see a relationship between his actions and the welfare of others." Rather, he follows rules so that he will not "get caught." Internalizing discipline recognizes the advantages of acting and reacting in a lawful manner rather than in an unlawful one, whether or not one will "get caught." The formally taught lesson would serve as the foundation of the law-based curriculum. In addition, opportunities exist for teaching these values through other formal subject areas and through the "hidden curriculum." 118

The nature of psychosocial development demands that this curriculum begin early. The sense of self and others begins to develop while the child is quite young, and this serves as the basis for all psychosocial development. Socialization, the process of learning how one is "supposed" to act, usually beings in a family setting. However, the school setting, where children are together in larger groups for about seven hours each day, provides another vehicle for socialization. All fifty states mandate that compulsory

<sup>111.</sup> Bettie B. Youngs, Self-Esteem in the School: More than a "Feel-Good" Movement, NASSP BULL., Jan. 1993, at 59.

<sup>112.</sup> Id. at 61.

<sup>113.</sup> *Id*.

<sup>114.</sup> Id. at 62.

<sup>115.</sup> Id.

<sup>116.</sup> Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986).

<sup>117.</sup> LAUREL N. TANNER, CLASSROOM DISCIPLINE FOR EFFECTIVE TEACHING AND LEARNING 61 (1978).

<sup>118.</sup> See infra notes 140-42 and accompanying text. See also the "curriculum onion" in MIKE BOTTERY, THE MORALITY OF THE SCHOOL: THE THEORY AND PRACTICE OF VALUES IN EDUCATION 96 (1990).

<sup>119.</sup> ERNEST T. GOETZ ET AL., EDUCATIONAL PSYCHOLOGY: A CLASSROOM PERSPECTIVE 98-106 (1992).

<sup>120.</sup> Id. at 100.

<sup>121.</sup> *Id.* 

schooling begin at an early age.<sup>122</sup> Although some leakage would occur due to the right of parents to fulfill the education requirements of their children via home schooling and private schools,<sup>123</sup> the greatest population of children is readily accessible within the public school setting. Furthermore, trends show that children are now entering the formal schooling process at a younger age. Pre-primary enrollment has increased, as have the number of hours that the pre-schooler spends at school.<sup>124</sup> This trend presents an opportunity to teach law-related education earlier when less "unlearning" would be required.

States by their constitutions are generally responsible for public education policy<sup>125</sup> and for almost half of relevant costs.<sup>126</sup> In addition, each state has primary authority to select the curriculum so that, if the state chose, it could have statewide textbook adoption as in Texas and California.<sup>127</sup> Therefore, in order to promote commitment and harmony, as well as faithfulness to the law, the state legislature or the state board of education, if authority exists therein, must take the initiative in guiding and monitoring a tort law based program.<sup>128</sup>

It is well settled law that the local school board makes curriculum decisions, too. For example, the rights to include music<sup>129</sup> and physical education<sup>130</sup> within the curriculum have been upheld. More recently, the dissenting Justice in *Hazelwood* related this position:

The public educator's task is weighty and delicate indeed. It demands particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so. Accordingly, we have traditionally reserved the "daily operation of school systems" to the States and their local school boards. 131

Although tort law already embodies community held values, community citizenship suggests that the local school districts seek additional input from parents, teachers, and community leaders in refining and supplementing a curriculum based on locality-specific needs and values. Justice Brennan acknowledged in *Hazelwood* that "the public educator

- 122. MICHAEL IMBER & TYLL VAN GEEL, EDUCATION LAW 17 (1993).
- 123. For a case dealing with the rights of parents in school selection, see Pierce v. Society of Sisters, 268 U.S. 510 (1925).
- 124. Between 1970 and 1980, pre-primary enrollment of three to five year olds increased by 19%; from 1980 to 1991, it rose by an additional 30%, with about 38% of these children attending school all day, compared with 32% in 1980 and 17% in 1970. DIGEST, *supra* note 10, at 61, Table 47.
  - 125. See supra note 85 and accompanying text.
- 126. In 1989-90, 47% of all revenues came from state sources, 47% from local sources, and 6% from the federal government. DIGEST, *supra* note 10, at 150, Table 148.
  - 127. IMBER & VAN GEEL, supra note 122, at 84-85.
- 128. Accord Lee Gordon, Note, Achieving a Student-Teacher Dialectic in Public Secondary Schools: State Legislatures Must Promote Value-Positive Education, 36 N.Y.L. SCH. L. REV. 397, 425 (1991).
  - 129. State ex rel. Andrews v. Webber, 8 N.E. 708 (Ind. 1886).
  - 130. Alexander v. Phillips, 254 P. 1056 (Ariz. 1927).
- 131. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278-79 (1988) (Brennan, J., dissenting, with whom Marshall and Blackmun, JJ., joined) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

nurtures students' social and moral development by transmitting to them an official dogma of 'community values.'"<sup>132</sup> He echoed the earlier decision in *Pico* where the Court quoted with approval the petitioner's brief stating that local school boards must be allowed "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral or political." Finally, teachers and administrators select specific methods of instruction depending on how the students learn and what resources are available.

The teaching of tort law principles need not be burdensome. First, every student today experiences a form of classroom rule dispensing. A formal program based upon the law would bestow legitimacy upon and conformity within the curriculum. Second, private schools have proven that a value education program can be successfully taught while fulfilling state education requirements.<sup>134</sup> Research shows that, in recent history, Catholic schools compare favorably to public schools in areas of academic outcomes, effective discipline, and a higher sense of community, with special effectiveness noted among students from "disadvantaged background[s]." The positive results do not derive solely from value inculcation as other important fundamental differences exist between public and Catholic schools. However, infusion of values is the core of the curriculum. The Catholic school model can serve as a guide for instilling values, not based upon religious edicts, but upon principles of law by which all citizens are governed. Characteristics of this model include an awareness that: (1) early introduction of value education is valuable; (2) there must be an integration of values into every curriculum area; and different methodologies of teaching of values are appropriate for different ages and different capabilities.

# C. Citizenship Education—The Hidden Curriculum

Although the focus of this Note is on student citizens and their interpersonal relationships with other student citizens, any values teaching must be done with action as well as with words. This concept underlies the "hidden curriculum," sometimes termed the "manipulative curriculum," the "informal curriculum," or the "unrecognized

<sup>132.</sup> *Id.* at 278 (quoting plurality opinion from Board of Educ., Island Trees v. Pico, 457 U.S. 853, 864 (1982)). Interestingly, the Supreme Court defers to contemporary community standards in determining what constitutes "prurient interest" in the meaning of obscenity. Miller v. California, 413 U.S. 15 (1973). On the opposite end of the spectrum, appropriately, the community should determine what comprises meritorious values.

<sup>133.</sup> Board of Educ., Island Trees v. Pico, 457 U.S. 853, 864 (1982).

<sup>134.</sup> See John J. Convey, Catholic Schools Make a Difference. Twenty-five Years of Research (1992).

<sup>135.</sup> Id. at 33.

<sup>136.</sup> Id. at 75.

<sup>137.</sup> See Irene T. Murphy, Early Learning: A Guide to Develop Catholic Preschool Programs, Preface (1986).

<sup>138.</sup> ROBERT J. KEALEY, CURRICULUM IN THE CATHOLIC SCHOOL 23 (1985).

<sup>139.</sup> See Mary Leanne Welch, A Beginning: Resource Book for Incorporating Values and Church Teachings in the Catholic School Curriculum (1990).

curriculum."<sup>140</sup> Many analysts believe that *how* the teaching and administration proceed in terms of interpersonal relationships is more influential in determining attitudes and behavior than are the textbooks and formal classroom instruction.<sup>141</sup> Therefore, the process of educating our youth for citizenship in public schools in not confined to books, the curriculum, and the civics class. Rather, "schools must teach by example the shared values of a civilized social order."<sup>142</sup>

## IV. CONSTITUTIONAL PARAMETERS

#### A. Curriculum Decisions and the First Amendment

Nonstatutory tort law is process-oriented and, consequently, less formal than would be more statutorily based disciplines. Therefore, establishing a program requires care so that a value-based curriculum is not applied haphazardly and does not overreach constitutional constraints.<sup>143</sup> The general rule is that "school boards may set curricula bounded only by the Establishment Clause."<sup>144</sup> A corollary tenet is that "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."<sup>145</sup>

The First Amendment to the Constitution demands that the government, whether national or state, remain neutral between religion and non religion. In its approach to this Establishment Clause principle, the Supreme Court has strictly enforced the "wall of separation" between church and state. Within the school context, the Court decided in 1962 that organized recitation of nondenominational prayer was unconstitutional. Soon thereafter, the Court struck down a requirement that a Bible be read at the beginning of each school day. Later that decade, in *Epperson v. Arkansas*, a state statute which disallowed the teaching of evolution in public schools, colleges, and universities was

- 140. BOTTERY, supra note 118, at 97-98.
- 141. WALDO BEACH, ETHICAL EDUCATION IN AMERICAN PUBLIC SCHOOLS 59 (1992).
- 142. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).
- 143. See Tyll van Geer, The Search for Constitutional Limits on Government Authority to Inculcate Youth, 62 Tex. L. Rev. 197 (1983).
- 144. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1080 (6th Cir. 1987) (Boggs, J., concurring opinion), cert. denied, 484 U.S. 1066 (1988).
  - 145. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).
  - 146. U.S. CONST. amend. I.
- 147. David G. Leitch, Note, *The Myth of Religious Neutrality by Separation in Education*, 71 VA. L. REV. 127 (1985) (citing letter from Jefferson to Messrs. Nehemiah Dodge and Others, A Committee of the Danbury Baptist Association (Jan. 1, 1802), *reprinted in Thomas Jefferson*, Writings 510 (M. Peterson ed. 1984)). The Note asserts that a broad definition of religion for free exercise purposes, if used within Establishment Clause analysis, is incompatible with the role of public educator as marketer of ideas because exclusion of religious viewpoints is intrinsically non-neutral; a pluralism model is not only equitable but constitutionally mandated.
  - 148. Engel v. Vitale, 370 U.S. 421 (1962).
  - 149. School Dist. of Abington v. Schempp, 374 U.S. 203 (1963).
  - 150. 393 U.S. 97 (1968).

found to be contrary to the freedom of religion demanded by the First Amendment, as applied to the States by the Fourteenth Amendment. In a 1971 decision, the Supreme Court delineated the *Lemon* test for determining whether or not an act violated the Establishment Clause.<sup>151</sup> To meet the measure of constitutionality, government conduct must encompass: (1) a secular purpose; (2) a principal effect neither to advance nor to inhibit religion; and (3) no excessive government entanglement with religion.<sup>152</sup> In 1985, a one minute silence for meditation or prayer during the school day was found to fail the *Lemon* test.<sup>153</sup> Soon thereafter, the Court considered a state statute broader than that in *Epperson* and held that the teaching of evolution when restricted to a concurrent teaching of creation science was also unconstitutional.<sup>154</sup>

In a more recent decision, the Supreme Court distinguished the formal curriculum from noncurriculum-related student organizations and decided that the Establishment Clause is not violated by a school district that allows a student Christian club to function on the school premises.<sup>155</sup> The Court in 1992 revisited the issue of Establishment Clause restrictions within a school setting when, in a five to four decision, it ruled that prayer given by the clergy at an official public school graduation ceremony is not permitted.<sup>156</sup> Justice Kennedy delivered the opinion of the Court, differentiating *Marsh v. Chambers*, in which the Court held that prayer exercised in a session of a state legislature does not violate the Establishment Clause. He asserted:

The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*. <sup>158</sup>

- 151. Lemon v. Kurtzman, 403 U.S. 602 (1971).
- 152. Id. at 612-13.
- 153. Wallace v. Jaffree, 472 U.S. 38 (1985).
- 154. Edwards v. Aguillard, 482 U.S. 578 (1987).
- 155. Board of Educ. of Westside Community Sch. v. Mergens, 110 S. Ct. 2356 (1990) (one dissent) (The Court decided this case in context of the Equal Access Act.).
- 156. Lee v. Weisman, 112 S. Ct. 2649 (1992) (Blackmun, J., concurred and filed an opinion with which Stevens and O'Connor, JJ., joined. Souter, J., concurred and filed an opinion with which Stevens and O'Connor, JJ., joined. Scalia, J., dissented and filed an opinion with which Rehnquist, C.J., White and Thomas, JJ., joined).
  - 157. 463 U.S. 783 (1983).
- 158. Lee, 112 S. Ct. at 2660. Compare Kurtz v. Baker, 829 F.2d 1133 (D.C. Cir. 1987), cert. denied, 486 U.S. 1059 (1988), where the majority of the District of Columbia Circuit Court of Appeals held that a nontheist had no standing to bring an action challenging refusal of the Congressional chaplains to invite nontheists to present secular discourse during morning prayer. Judge (now United States Supreme Court Justice) Ruth Bader Ginsburg, disagreeing with the court's no standing disposition of the case, would have resolved the issue by recognizing that House and Senate rules "authorize opening legislative sessions with prayer, nothing more and nothing else. . . . Kurtz has, under current jurisprudence, no tenable free speech, establishment clause, or due process claim to advance. I would so hold directly and would not avoid the question by a circuitous determination that Kurtz lacks standing to seek its settlement." Id. at 1147-48.

In addition to remaining religion-neutral in establishment of religion, government is also banned from unduly interfering with the free exercise of religion. This First Amendment tenet has also been implicated in judicial decision-making within the context of the public school. The Court intervened in *West Virginia Board of Education v. Barnette* and found that a public school could not force a student to salute the American flag when, under his religious beliefs, the flag was an "image" which his Bible forbad him to worship.

More recently, the Ninth Circuit in *Grove v. Mead School District* delineated the factors to be considered in a claim of violation of the right to free exercise of religion: (1) the degree of burden upon the right to free exercise of religion; (2) the presence of a compelling state interest legitimizing the burden; and (3) the effect that accommodation of the complainant would have on state's objectives.<sup>161</sup> Although the Court of Appeals found that the parent had standing because of her right to direct her child's religious training,<sup>162</sup> it held that the inclusion of a book in the tenth grade literature curriculum over the parent's objections did not violate the Free Exercise Clause. In denying the removal of the book, the three-judge panel described it as a "comment on an American subculture" and "religiously neutral." <sup>163</sup>

The Sixth Circuit, meeting *en banc*, likewise ruled in an alleged violation of the Free Exercise Clause that the reading of a basic reader series chosen by school authorities was not an unconstitutional infringement of the right to free exercise of religion because "students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion." The setting of this controversy was Tennessee, where, by statute, public schools were required to include "character education" in the curriculum; however, the parents' objections targeted alleged teachings about secular humanism, evolution, pacifism, and magic. Although elements of compulsion might invoke the Free Exercise Clause, the court noted that it is an infringement upon the Establishment Clause "to tailor a public school's curriculum to satisfy the *principles or prohibitions* of any religion." Both *Grove* and *Mozert* can be interpreted to permit a fairly high degree of deference to the states in formulating curriculum decisions.

<sup>159.</sup> U.S. CONST. amend I.

<sup>160. 319</sup> U.S. 624 (1943); cf. Sherman v. Community Consol. Sch. Dist., 980 F.2d 437 (7th Cir. 1992) (holding that a state statute requiring public school elementary students to recite the Pledge of Allegiance with its phrase "under God" did not violate the Establishment Clause of the First Amendment; the term was but a ceremonial invocation of God).

<sup>161. 753</sup> F.2d 1528, 1533 (9th Cir. 1985) (citing Callahan v. Woods, 736 F.2d 1269, 1273 (9th Cir. 1984)), cert. denied, 474 U.S. 826 (1985).

<sup>162.</sup> Id. at 1532.

<sup>163.</sup> Id. at 1534.

<sup>164.</sup> Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988).

<sup>165.</sup> Id. at 1062.

<sup>166.</sup> Id. at 1064 (citing Epperson v. Arkansas, 393 U.S. 97, 106 (1968)) (emphasis added).

# B. Passing Constitutional Muster

A tort law based curriculum must comport with Establishment Clause and Free Exercise Clause limitations. In addition, it cannot unduly trammel upon an individual's realm of intellect and conscience.

Although the *Lemon* test has recently been brought into question, <sup>167</sup> it does provide a formidable structure for analysis of a curriculum proposal. The secular purpose element should be satisfied because the state has a well established and powerful interest in the education of its students. Likewise, the *principal* effect is neither to advance nor inhibit religious beliefs. The question remains how much "entanglement" with religion is unavoidable.

Every law embodies a set of values that were considered of merit and all laws consist of a choices of values, so the state is by nature a "purveyor of morality." Arguably, the Supreme Court itself chooses values. Because religion and law embody certain parallel virtues, a curriculum based upon tort law will necessarily have a positive correlation with various religious teachings. For example, teaching respect for another's property is analogous to the commandment "[y]ou shalt not steal," and slander and libel are similar to giving "false testimony against your neighbor." Consequently, a value-oriented curriculum could be found offensive to some, but offense, by itself, is not a violation of the First Amendment. Although law expresses public morality, obviously, morality is not synonymous with religion, and any contrary argument is disingenuous. A tort-based curriculum would pass the *Lemon* test.

The responsibility of legislators, teachers, textbook committees, and boards of education is to strive to see that the utterances of the state are faithful to what appears to be a genuine communal consensus, understanding all the while that no claim can be made that a particular societal consensus reflects a true, correct, eternal, moral stance.<sup>173</sup>

Furthermore, because any law-related education program does not occupy the field, it should not unreasonably interfere with the freedom of parents to teach children principles they deem appropriate. A tort-based program is not intended to be a unitary source of value education. As Justice Kennedy remarked: "[W]e acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce." Furthermore,

<sup>167.</sup> See discussion of *Lee v. Weisman* in Sherman v. Community Consol. Sch. Dist., 980 F.2d 437, 445 (7th Cir. 1992).

<sup>168.</sup> Don Welch, The State As a Purveyor of Morality, 56 GEO. WASH. L. REV. 540, 543 (1988).

<sup>169.</sup> See Robert H. Bork, Styles in Constitutional Theory, 26 S. TEX. L.J. 383, 387 (1985).

<sup>170.</sup> Exodus 20:15 (New International Version).

<sup>171.</sup> Exodus 20:16 (New International Version).

<sup>172.</sup> Lee v. Weisman, 112 S. Ct. 2649, 2661 (1992).

<sup>173.</sup> Welch, supra note 168, at 551. See Note, Toward a Constitutional Definition of Religion, 91 HARV. L. REV. 1056, 1083-89 (1978) (discusses connotations of "religion"). Also, see discussion of relation between law and morals in RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 262-63 (4th ed. 1992).

<sup>174.</sup> Lee, 112 S.Ct. at 2661.

the compelling state interest in informing citizens of the duties under the law for which they will be held accountable substantially outweighs any burdens placed upon parents. Although a value education program, even when cloaked in terms such as "character education" or "social norm education," may not please parents of every religious denomination, "[i]f we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds." In addition, "Government . . . retains the right to set the curriculum in its own schools and insist that those who cannot accept the result exercise their right . . . and select private education at their own expense." 176

A third and crucial challenge remains. Any mandatory value education program may not encroach upon "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." The Supreme Court pronounced in *Barnette* that: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or *other matters of opinion* or force citizens to confess by word or act their faith therein." For some time the Court has discouraged tunnel-visioned access to ideas disseminated in the public schools. More recently, in *Weisman*, the warning was reiterated: "A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." 180

This limitation on indoctrination is especially crucial in the elementary and secondary schools where the government owns a near monopoly in speaking to a captive audience whose youth and experience level hinder critical evaluation. Furthermore, students are typically reinforced positively in proportion to their exhibited level of conformity to the ideas presented within the classroom. Yet the power and need to inculcate legitimate values need not rise to the level of "indoctrination," defined as "the unbalanced presentation of *controversial* ideas." Although law embodies the ideas and opinions of a society, tort law principles such as self-esteem and respect for the persons and property of others are hardly controversial ideas. In addition, while governmental neutrality has been a core principle in judging First Amendment speech, <sup>182</sup> governmental speech has been noted as not usually requiring neutrality because this requirement is both too limiting and too expansive. <sup>183</sup>

<sup>175.</sup> McCollum v. Board of Educ., 333 U.S. 203, 235 (1948) (referring to the then 256 separate religious entities in the continental U.S.). *Accord* Sherman v. Community Consol. Sch. Dist., 980 F.2d 437, 444 (1992).

<sup>176.</sup> Sherman, 980 F.2d at 445 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925)).

<sup>177.</sup> West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

<sup>178.</sup> Id. (emphasis added).

<sup>179.</sup> E.g., Board of Educ., Island Trees v. Pico, 457 U.S. 853 (1982).

<sup>180.</sup> Lee v. Weisman, 112 S. Ct. 2649, 2658 (1992).

<sup>181.</sup> Stephen E. Gottlieb, In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools, 62 N.Y.U. L. REV. 497, 547 (1987) (emphasis added) [hereinafter "Bending" History in Public Secondary Schools].

<sup>182.</sup> See Stephen E. Gottlieb, The Speech Clause and the Limits of Neutrality, 51 ALB. L. REV. 19 (1986).

<sup>183. &</sup>quot;Bending" History in Public Secondary Schools, supra note 181, at 536-38. The author argues that,

A tort-based law-related education program cannot rise to the level of orthodoxy so as to institute a "[state] religion or religious faith." Clearly, respect for others includes respect for the unique array of talents and diverse characteristics of each member of society. Furthermore, a law-related curriculum must include an understanding that the law is not a static entity but rather an ever developing organism. Knowledge of the law and of legal processes provides a mechanism for beneficial participation in changing "undesirable" attributes. If compliance with the present day dictates of law were to beget uniformity of thought and spirit by exclusion of and refusal to explore ideas, greater risks both to society and to the individual would accrue in the long run. Rather than becoming "closed circuit recipients," students must be taught critical thinking and analytical skills to re-evaluate the legitimacy of society's law-based values.

### V. ADVANTAGES

Schools could efficiently compensate for the fewer opportunities for the modern family to inculcate values in children so that a proactive law-related program would comport with economic theory.

If the content of a law became known only after the events to which it was applicable occurred, the existence of the law could have no effect on the conduct of the parties subject to it. The economic theory of the law is the theory of law as deterrence, and a threat that is not communicated cannot deter.<sup>187</sup>

The direct cost to the State in its investment in human capital, activated at the early stages in child development, should be small compared to the direct costs of rehabilitation or remediation.<sup>188</sup> In addition, human costs including decreased feelings of safety, decreased focusing on academics, and decreased sponsorship of unusual and rewarding extra-curricular activities,<sup>189</sup> could be avoided. Collectively, society could partially circumvent the costs of low teacher morale and the resultant loss of highly qualified teachers.<sup>190</sup> Added benefits would accrue if students, armed with an awareness of their worth and of the worth of others, share their experiences with their parents and create a "trickle up" effect.

rather than using self-government, the marketplace of ideas, or checking value tests, the fairness test as used in the context of the broadcasting industry is appropriate for distinguishing between improper indoctrination and legitimate teaching of history. *Id.* at 553-79.

- 184. Lee, 112 S. Ct. at 2655 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).
- 185. "Bending" History in Public Secondary Schools, supra note 181, at Summary, 552.
- 186. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 511 (1969).
- 187. POSNER, supra note 173, at 265.
- 188. For every dollar spent on pre-school education, an estimated six dollars was saved in costs of special education, welfare, crime and decrease in worker productivity. Clinton, *supra* note 85, at 10 (referring to statistics from the House Select Committee on Children, Youth and Families, Opportunities for Success: Cost Effective Programs for Children—Update, 1988, at 39 (1988)).
  - 189. Edward Wynne, Discipline in a Good School, SOC'Y, May-June 1990, at 98, 100.
  - 190. James K. Nighswander, A Guidebook for Discipline Program Planning 3-5 (1981).

In addition to being efficient, tort-based law-related education can be effective: "[O]verwhelming evidence suggests that reward, praise, and interactions with children which promote the development of a positive self concept are the most powerful motivators for learning." Existing program research shows that students participating in law-based programs exhibit an overall improvement in behavior. An earlier introduction of additional principles of law should promote more favorable results. Although any law-based program has limitations and can hardly substitute for nurturing received in the family unit, without a degree of school success, neglected children rarely improve. 193

Furthermore, a tort law-based education program should be highly accepted by teachers and students. Teachers recognize the need for creative solutions to social problems within the school setting and accept their expanded role in development of a child's potential. In a 1989 survey of teachers, 91% answered that a non-traditional approach to education would either "help a lot" or "help some." When asked to respond to the statements, "A school's job is to teach children. Health and social problems should be addressed by other agencies outside the school," 74% either somewhat disagreed or strongly disagreed. Students, too, feel the need for increased safety and should welcome the opportunity to more fully satisfy this basic need.

#### **CONCLUSION**

The Supreme Court recognizes the role of the school in transmitting cultural values. However, value inculcation in the public schools has been criticized and its effectiveness doubted because of disagreement over what and whose values to inculcate. Law-based education embodies a communal consensus and thus provides a legitimate basis for teaching values within the public schools' formal and informal curricula. Tort law, founded on self-esteem and a belief in the value of other persons and their property, is the vehicle by which this can be introduced into the early childhood curriculum. Because attitudes are framed early in a child's development, the establishment of a constitutionally sound, compulsory program as soon as a child enters school comprises a preventive approach to discipline and behavior problems which can improve learning in all subject areas. Enhancing compliance with the law within the school should spill over into the

<sup>191.</sup> Irwin A. Hyman, Eliminating Corporal Punishment in Schools: Moving From Advocacy Research to Policy Implementation, 9 CHILDREN'S LEGAL RTS. J. 14, 16 (1988).

<sup>192.</sup> Janice K. Colville & Rodney H. Clarken, *Developing Social Responsibility Through Law-Related Education*. Paper presented at Annual Meeting of Educational Research Association (San Francisco, Cal., Apr. 20-24, 1992) (on file with author). Programs include student involvement with case studies, mock trials and active involvement of police officers, lawyers, judges and others.

<sup>193.</sup> Margaret Beyer, et al., Treating the Educational Problems of Delinquent and Neglected Children, 9 CHILDREN'S LEGAL RTS. J. 2, 11 (1988) (referring to Schools That Work: Educating Disadvantaged Children. U.S. Dep't of Educ., Pueblo, Col. G.P.O. (1987)).

<sup>194.</sup> Metropolitan Life/Louis Harris Associates, Inc., *The American Teacher*, 1989, DIGEST OF EDUC. STATISTICS, at 30, Table 24 (1992).

<sup>195.</sup> American Teacher, 1991, supra note 15, at 31, Table 26.

<sup>196.</sup> See supra note 21 and accompanying text.

out-of-school environment. By using the law to educate and socialize children into lawful behavior patterns, preventive law, developed within an integrated public school curriculum, can efficiently and effectively confer upon each citizen an ownership in the law. This proprietorship produces a more informed citizenry prepared to participate more fully and more positively in this government "by the people."

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